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Supreme Court of The United States

October Term, 1979

No. 79-45

GERALD A. LEWIS, Comptroller of the State of Florida and Commissioner of Banking of the State of Florida,
Appellant,

-vs-

BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISRICT OF FLORIDA, TALLAHASSEE DIVISION

BRIEF FOR THE APPELLANT

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BT INVESTMENT MANAGERS, INC. and BANKERS TRUST NEW YORK CORPORATION,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF FLORIDA, TALLAHASSEE DIVISION

BRIEF FOR THE APPELLANT

This brief is filed pursuant to Rule 40 of the Rules of this Court. References to the separate Appendix of relevant portions of the Record will be designated as (App.____). References to the Appendix to the Appellant's blue Jurisdictional Statement will be designated as (Blue J.S. App. ____). References to the Appendix attached to this Brief will be designated as (App.____herein).

OPINIONS BELOW

The Order and Opinion of the United States Three Judge District Court for the Northern District of Florida dated December 15, 1978 is reported at 461 F.Supp. 1187 (N.D. Fla. 1978) and is set forth at (Blue J.S. App. Al and B1). The Order and opinion of March 22, 1979, altering and amending the Order of December 15, 1978, is not reported, but is reprinted at (Blue J.S. App. D1 and E1).

JURISDICTION

The appeal herein is from a Final Order made and entered in the United States District Court for the Northern District of Florida by a specially constituted three judge court convened pursuant to 28 U.S.C. § 2281 (1970).[1] That Order, as amended, declares unconstitutional an enjoins the enforcement of a portion of Florida Statutes § 659.141(1) (1977); and declares unconstitutional Florida Statutes § 660.10 (1977). Both statutes were found to be violative of Article I § 8, cl. 3 (the Commerce Clause) of the United States Constitution.

The Final Order was made and entered on December 15, 1978. A motion for clarification, reconsideration and to alter and amend judgment was duly filed December 26, 1978. The Order was altered and amended, in part, on

[1] 28 U.S.C. § 2281 (1970) was repealed by Pub.L. 94-381, August 12, 1976, 90 Stat. 1119. However, this repealer was expressly inapplicable to any action commenced on or before August 12, 1976. This action was filed on October 24, 1973, and thus the repealer does not affect the statutory jurisdiction of the Court over this appeal.

March 22, 1979. A protective Notice of Appeal to the United States Court of Appeal for the Fifth Circuit was filed in the district court on April 20, 1979. On May 14, 1979, further proceedings in appeal to the Fifth Circuit were stayed, pending the resolution of any jurisdictional problem in this Court. Notice of Appeal to this Court on behalf of the Appellant was filed on May 11, 1979, in the United States District Court for the Northern District of Florida. Appellant filed his Jurisdictional Statement on July 10, 1979, and on October 1, 1979, this Court "noted probable jurisdiction."

The Supreme Court of the United States has jurisdiction to review the Final Order by direct appeal pursuant to 28 U.S.C. § 1253. *White v. Regester,* 412 U.S. 755, 761 (1973); *Roe v. Wade,* 410 U.S. 113, 123 (1973); *Florida Lime and Avocado Growers v. Jacobsen,* 326 U.S. 73, 80 (1960).

QUESTIONS PRESENTED

The Bank Holding Company Act of 1956, as amended, with certain exceptions, prohibits a bank holding company from directly or indirectly engaging in nonbanking activities. However, a bank holding company, with Federal Reserve Board approval, may engage in certain activities which are deemed "so closely related to banking to be a proper incident thereto." The Act further specifically prohibits bank holding company expansion into banking across state lines, unless specifically authorized by state statute. Florida Statutes § 659.141(1) (1977), in part, specifically prohibits a bank holding company, the operations of which are principally conducted outside of Florida, from directly

or indirectly owning, acquiring or controlling a bank, *trust company or investment advisory business in Florida.* Florida Statutes § 660.10 (1977) prohibits all corporations except banks and trust companies incorporated under the laws of Florida and having trust powers, and except national banking associations located in Florida and having trust powers, from performing certain fiduciary and trust activities. The questions presented are:

1. Whether the Bank Holding Company of 1956, and as amended, authorizes, recognizes and respects the right of each state to restrict bank holding company expansion across state boundaries, and forbid the entry of out-of-state bank holding companies into banking and certain "closely related" activities, such as trust and investment advisory business, located within its jurisdiction.

2. Whether, as a proper incident of its traditional power to regulate the performance of trust activities, a state may, without violating the "Commerce Clause" of the United States Constitution, restrict such activities to domestic corporations who have obtained a specific charter and certificate of authority to perform trust business.

3. Whether the lower court incorrectly applied the Commerce Clause principles laid down by this Court in *Philadelphia v. New Jersey,* in holding as unconstitutional a portion of Florida Statutes § 659.141(1) (1977) and Florida Statutes § 660.10 (1977).

THE CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

1. *Article I § 8 Cl. 3 United States Constitution*

Congress shall have power . . . to "regulate commerce . . . among the several states, . . ."

2. Florida Statutes § 659.141 (1977)
(The full text of the statute is set forth in App. A herein.)

3. Florida Statutes § 660.10 (1977)
(The full text of the statute is set forth in App. B herein.)

4. 12 U.S.C. § 1842(d)
(The full text of the statute is set forth in App. C herein.)

5. 12 U.S.C. § 1843(a) and (c) (8)
(The full text of the statute is set forth in App. D herein.)

6. 12 U.S.C. § 1846
(The full text of the statute is set forth in App. E herein.)

7. 12 C.F.R. § 225.4(a)(4) and (5)
(The full text of the regulations is set forth in App. F herein.)

STATEMENT

Appellee, Bankers Trust New York Corporation (hereinafter "BTNYC") is a New York corporation principally conducting business in New York and a "bank holding company" within the meaning of the Bank Holding Company Act of 1956, as amended, 12 U.S.C. § 1841, *et seq.*

(hereinafter the "Act"). BTNYC organized and incorporated a Delaware corporation, Appellee, BT Investment Managers, Inc. (hereinafter "BTIM"), a wholly-owned subsidiary which subsequently qualified to do business in Florida.[2] BTIM was formed for the purpose of engaging in the business of providing investment services, but because it is owned by a bank holding company, it could not engage in such business until such time as it acquired the approval of the Federal Reserve Board.[3]

BTNYC and BTIM applied for such approval in October, 1972. (App. 23). Objections to the application were filed by Fred O. Dickinson, Jr., as Florida Comptroller, defendant, Lewis' predecessor in office, and by the Florida Bankers Association (FBA), amicus curiae below.[4]

At the time the application was filed, Florida Statutes § 659.141(1) (1971) prohibited Appellee, BTNY, an out-of-state holding company, from owning or controlling an investment advisory business in Florida where or from which it furnishes investment advisory services to trust companies or banks in Florida. While the plaintiff's ap-

[2] See Stipulation filed by the parties May 11, 1978. App. 22).

[3] Under Section 4(c)(8) of the 1956 Act, 12 U.S.C. § 1843(c)(8), a bank holding company like BTNYC has to secure permission from the Board of Governors of the Federal Reserve System to own or control shares of a company, the activities of which are "so closely related to banking or managing or controlling banks as to be a proper incident thereto" (App. D herein). The Board has provided by regulation that "acting as an investment or financial advisor" is such an activity. 12 C.F.R. § 225.4(a)(5) (1978) (App. E herein).

[4] Defendant, Gerald A. Lewis, is the incumbent Comptroller of the State of Florida, and was properly substituted as a party defendant.

plication before the Board was pending, the Florida legislature, amended § 659.141(1), effective December 21, 1972, and extended the prohibition to businesses furnishing investment advisory services to any person rather than, theretofore, only to Florida trust companies and banks.

In April, 1973, the Board of Governors of the Federal Reserve System denied the Plaintiff's application, in accordance with *Whitney National Bank v. Bank of New Orleans*, 379 U.S. 411, (1965), principally because of the prohibition of Florida Statutes § 659.141(1), as amended. 59 Fed. Res. Bull. 364, 367 (1973) (App. 26).[5]

Plaintiffs did not initially appeal the decision of the Board of Governors, but rather filed suit in October, 1973, in federal court attacking the constitutionality of the Florida laws. According to plaintiffs, BTNYC did petition the United States Court of Appeals for the Second Circuit for review of the Order of the Board denying its proposal to act as an investment adviser. Apparently, the petition has been withdrawn with leave of the court to reinstate at the option of BTNYC pending the outcome of the instant litigation.[6]

In October, 1973, plaintiffs filed suit against the Comptroller of the State of Florida, defendant's prede-

[5] In denying the application because of Florida Statute § 659.141(1) the Board specifically relied on Section 7 of the 1956 Act, 12 U.S.C. § 1846 (1976), and *Whitney Nat'l Bank v. Bank of New Orleans and Trust Co.*, 379 U.S. 411 (1965).

[6] See Appellees' Brief in Support of Motion to Affirm, at page 10, filed with this Court in August, 1979. The petition was filed November 13, 1973, subsequent to the filing of the instant suit and some six months after the decision of the Federal Reserve Board.

cessor in office, seeking a declaration that Florida Statutes §§ 659.141(1) and 660.10 contravene the United States Constitution.[7] In addition to the investment advisory office, BTNYC is also seeking to establish, through a subsidiary, a *de novo* Florida trust company. Florida Statutes §§ 659.141(1) and 660.10 together prohibit such establishment. It was stipulated by the parties that but for he existence of the challenged statutes, BTNYC would have applied to the Board of Governors of the Federal Reserve System for authority to engage, through a subsidiary, in trust business in Florida.[8]

The cause was originally dismissed by the three judge court on "abstention" grounds, pending interpretation of laws by Florida courts. Plaintiffs originally sought to appeal the dismissal directly to this Court. However, 28 U.S.C. § 1253 provides for direct appeal to the Supreme Court only from "an order granting or denying . . . an interlocutory or permanent injunction. . . ." Since the order merely dismissed the action on the basis of the abstention doctrine, the appeal was improvidently taken, and this Court accordingly declined to take jurisdiction. Upon remand, the three judge court entered a fresh order

[7] The complaint alleges four constitutional grounds upon which the statutes are said to be involved: (1) denial of equal protection; (2) contravention of the Commerce Clause; (3) denial of substantive due process; and (4) violation of the supremacy clause, Article VI, clause 2. Plaintiffs abandoned reliance on the last two of these contentions prior to the final hearing in this case (Blue J.S. App. B25). See 461 F.Supp. at 1191, note 4.

[8] See Stipulation filed May 11, 1978 (App. 22). Trust company business is an activity the Board has determined to be a "closely related" activity to banking to be deemed a proper incident thereto (App. F herein).

from which plaintiffs took an appeal to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit held that the abstention doctrine was not applicable and remanded the case for a decision on the merits. See *BT Investment Managers, Inc. v. Lewis,* 559 F.2d 950, 953 (5th Cir. 1977)

Upon stipulated facts (App. 22), final hearing was held on September 1, 1978. The three judge federal district court by Final Order, as amended, declared Florida Statutes § 660.10, and a portion of the first sentence of Florida Statutes § 659.141, which prohibits a bank, trust company or holding company, the operations of which are principally conducted outside Florida, from acquiring, owning or controlling a Florida trust company or investment advisory business, unconstitutional as violative of Article I § 8 of the United States Constitution. Defendant was permanently enjoined from enforcing against plaintiffs the aforesaid portion of the first sentence of Florida Statutes § 659.141(1) (1977).[9] The district court did not grant injunctive relief as to Florida Statutes § 660.10 (1977), stating, at 461 F. Supp. at 1201,

> Since plaintiffs have yet to attempt to establish a trust company subsidiary in Florida, injunctive relief barring enforcement of Florida Statutes

[9] The court originally declared the entire first sentence of § 659.141(1) unconstitutional. However, by Order dated March 22, 1979, the court amended the original Order limiting its declaration to that portion of the sentence dealing with investment advisory services and trust services. (Blue J.S. App. D1 and E1). Thus the final decision did not address the constitutionality of that portion of § 659.141(1) which governs acquisition of Florida banks by out-of-state banks, bank holding companies or trust companies.

§ 660.10 would be premature, and therefore inappropriate, at this time.

The court held that both Florida laws were *per se* unconstitutional in contravention of the Commerce Clause, relying on *Philadelphia v. New Jersey* 437 U.S. 617 (1978).[10] The court specifically found that: (1) § 659.141(1) erects an insuperable barrier to the entry of foreign-based bank holding companies, through their subsidiaries, into the Florida investment advisory market; and (2) § 660.10 similarly cordons off Florida trust companies from competition by out-of-state concerns. 461 F.Supp. at 1196. The court, in rejecting defendant's arguments, specifically held that § 3(d) of the 1956 Act, 12 U.S.C. § 1842(d) (1976), applied only to state laws governing holding company acquisition of banks and did not cover laws governing acquisition of trust services, investment advisory services or other activities "closely related" to banking. 461 F.Supp. at 1199.

The court further held that § 7 of the 1956 Act, 12 U.S.C. § 1846 (1976), Reservation of Rights to States, merely,

> . . . assure(s) that the states will not be deemed dispossessed of whatever regulation authority they exercised over banks and bank holding companies prior to passage of the Bank Holding Company Act. In no wise does it pass on to the states the power to adopt regulations on any subject which would otherwise be contrary to the commerce clause. 461 F.Supp at 1199.

[10] Having determined that the subject statutes offend the Commerce Clause, the court expressed no opinion as to the validity or invalidity of the statutes under any other constitutional theory proffered by plaintiffs. See 461 F.Supp. at 1191. It should also be noted that both Florida Statutes § 660.10 and Florida Statutes § 659.141 are affected by the Florida Regulatory Reform Act of 1976, Florida Laws 1976, ch. 760178, Florida Statutes § 11.61, and are slated to be repealed effective July 1, 1980, unless the legislature decides prior to January 1, 1980, to retain them. See 461 F.Supp. at 1191, note 3.

SUMMARY

Point I. The Bank Holding Company Act of 1956, and as amended, authorizes, recognizes and respects the right of each state to restrict bank holding company expansion across state boundaries, and forbid the entry of outside bank holding companies into banking and certain "closely related" activities located within its jurisdiction.

A. The express grant of authority to the states to prohibit or exclude an out-of-state bank holding company from owning, acquiring or controlling a bank in a particular state, 12 U.S.C. § 1842(d) of the Bank Holding Company Act of 1956, necessarily includes an implied grant of authority to prohibit or exclude entry into certain activities "clasely related" to banking, *i.e.* investment advisory and trust business. This premise is based on the original congressional intent of the enactment of the 1956 Act. It was not changed after the 1970 Amendments to the Act.

The primary objective of the Act was to prevent the undue concentration of economic power in bank holding companies. Consistent with this objection, the Act generally prohibited a bank holding company from acquiring any nonbanking company. Section 4(a) of the 1956 Act, 12 U.S.C. § 1843(a)(1). However, bank holding com-

panies were permitted to conduct certain activities which were "financial, fiduciary or insurance in nature" which the Board of Governors determined to be "so closely related to the business of banking as to be a proper incident thereto." 12 U.S.C. § 1843(c)(6) (1964), as amended, 12 U.S.C. § 1843(c)(8) (Supp. V, 1965-69).

The Board of Governors restrictively interpreted the "closely related" test as prohibiting affiliation with any company whose activities were not "directly and significantly connected" to the banking operations that the particular holding company was already engaged in. See *Transamerica Corp.*, 1957 Fed. Res. Bull. 1014.

Since § 1842(d) specifically prohibited bank holding company expansion across state lines into banking, it also prohibited expansion across state lines into activities which were "financial, fiduciary or insurance in nature." This is so because any proposed subsidiary geographically removed from the bank holding company's banking subsidiary would not be "directly and significantly" connected to the "business of banking." However, under this test, it would also restrict bank holding expansion within a particular state, if the proposed nonbanking activity was graphically removed from the bank subsidiaries' operations. This result is surely consistent with the general intent and purpose behind the 1956 Act.

The crucial inquiry now becomes whether the 1970 Amendments to the Act change or alter these concepts. Contrary to the conclusion of the district court, the 1970 Amendments neither changed the original intent of the 1956 Act, nor liberalized or expanded the range of business

activities in which bank holding companies could engage. *Alabama Ass'n of Ins. Agents v. Board of Governors*, 533 F.2d 224, 231 (5th Cir. 1976).

The most significant amendment was the elimination of the one-bank holding company loophole, which had been previously exempt under the 1956 Act. After a fierce legislative battle over § 1843(c)(8), this section was amended to read "closely related to banking," instead of "closely related to the business of banking." Of significance is the retention of the "closely related" language and rejection of the "functionally related" language, which had been suggested by those favoring expansion of bank holding companies. The change of the phrase "the business of banking" may have somewhat removed the geographic restriction on expansion within a state, but it would be inconsistent with the congressional intent behind the amendment to conclude that it affected any restrictions on expansion across state lines.

Because the 1970 Amendments did not affect the original intent of the 1956 Act—to prevent the concentration of economic power by bank holding companies—it is quite consistent to conclude that the state's ability to prohibit the acquisition of banks must necessarily carry with it the ability to prohibit the acquisition of companies involved in closely related activities.

B. In addition, defendant submits that 12 U.S.C. § 1846, Reservation of Rights to States, authorizes, recognizes and respects the right of each state to forbid the entry of out-of-state bank holding companies into "closely related" activities located within its boundaries. The lan-

guage of § 1846 specifically refers to state powers and jurisdiction with respect to bank holding companies and their subsidiaries.

Legislative history clearly shows that the section preserved to the states a right to be more restrictive regarding the formation or operation of bank holding companies within their respective borders than the federal authorities can be or are under the 1956 Act. S.Rep. No. 1095, pt. 1, 84th Cong. 1st Sess., 2, (1955), U.S. Code Cong. & Adm. News 1956, pp. 2482, 2492, 2504. The legislative history, together with judicial interpretations of § 1846, confirm that the section preserves to the states, the broad power sufficient to bar bank holding companies or their subsidiaries from extending their domains. *Whitney National Bank v. Bank of New Orleans*, 379 U.S. 411, 419, 424, 428, 430 (1956).

In *Whitney, supra*, this Court found that the Federal Reserve Board could not approve a holding company arrangement involving the organization and opening of a new bank if the opening of the bank, by reason of its ownership by a bank holding company would be prohibited by a valid state law.

Similarly, the Fifth Circuit Court of Appeals recognized the importance of state legislation prohibiting or limiting a bank holding company's expansion into "closely related activities," pursuant to 12 U.S.C. § 1843(c)(8). *Florida Ass'n of Ins. Agents v. Board of Governors*, 519 F.2d 334, 342 (5th Cir. 1979). In applying the principles announced in *Whitney, supra*, the court found that the Board of Governors cannot ignore the applicability and

effect of state law inasmuch as it bears upon the "public interest" determination required by 12 U.S.C. § 1843(c)(8). Section 1843(c)(8) requires a two-tiered determination before the Board can approve a proposal to expand into "closely related" activities. First, the activity must clearly be "closely related" to banking. Second, and more importantly, the proposal must meet the "public benefits" test. A crucial determining factor to consider under this later test is whether the proposal violates state law. If so, then approval is necessarily precluded because "it would hardly be consistent with the public interest to approve a plan which violates state law."

Consequently, it is § 1846, authorizing, recognizing and respecting a state's right to bar bank holding company expansion, which necessarily requires the Board to consider and follow state law in determining a proposal to engage in a "closely related" activity under § 1843(c)(8).

In conclusion, 12 U.S.C. §§ 1842(d) and 1846, together and apart from each other, sufficiently authorize state legislation such as enacted in Florida. Since these federal statutes very clearly guarantee to the states the power to absolutely exclude bank holding companies principally operating outside of a state from acquiring in-state banks, they must also have been intended to guarantee th states the power to exclude those same holding companies from the performance of services "so closely related to banking . . . as to be a proper incident thereto." There is no indication that Congress intended to limit the regulatory power of the states when it amended the Bank Holding Company Act to permit bank holding companies to engage in "closely related" activities. The judicial creation of such a loophole would result in foreign holding companies being able to expand their operation into states

in the face of a clear congressional mandate giving the states the right to exclude those holding companies. The effect of such a loophole would be to circumvent the power expressly reserved to the States to regulate banking functions within their boundaries.

Point II. As a proper incident of its traditional police power to regulate the performance of trust activities, a state may, without violating the Commerce Clause, restrict such activities to domestic corportions who have obtained a specific charter and certificate of authority to perform trust business.

Florida Statutes § 660.10 (1977), stricken by the district court as violative of the Commerce Clause, prohibits all corporations, except banks and trust companies incorporated under the laws of Florida and having trust powers, and except national banking associations located in Florida and having trust powers, from performing certain fiduciary and trust activities. It has been the governing law of Florida for over 50 years, and is similar to statutes enacted in other jurisdictions for similarly lengthy periods. The statute clearly governs an area of traditional state concern.

In holding § 660.10 as violative of the Commerce Clause, the district court failed to consider it in its proper context. Plaintiffs' primary focus in this litigation is Florida Statutes § 659.141(1) (1977), which prohibits a bank holding company, whose operations are principally conducted outside of Florida, from owning or controlling a Florida trust company or investment advisory business. Section 660.10 is attacked only insofar as it compliments § 659.141(1). Ownership, acquisition or control of a corporation seeking to do Florida trust business is completely

irrelevant in § 660.10. Consequently, the statute, by itself, would not prohibit plaintiffs from establishing a Florida corporation to perform trust business. Thus the district court has gone too far in casually declaring the statute unconstitutional.

In addition, the district court incorrectly applied Commerce Clause principles in striking § 660.10. The court boldly, and we submit erroneously, concludes that the statute facially discriminates against out-of-state businesses, to the detriment of interstate commerce, for the protection of local trust business. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). To the contrary, § 660.10 prohibits not only out-of-state corporations from performing certain fiduciary activities, it prohibits all corporations, foreign and domestic, except Florida corporations who have been specifically chartered as trust companies and national banks located in Florida, with specific trust powers.

Section 660.10 merely requires an entity wishing to engage in certain trust activities to incorporate in Florida as a trust company. Out-of-state individuals are free to organize and own a trust company in Florida. And apart from § 659.141(1), an out-of-state corporation could establish a Florida subsidiary trust company to engage in trust activities and compete with other Florida trust companies and banks having trust powers.

If § 660.10 discriminates in any way, it is not against any particular segment of commerce, but rather against a particular way of doing business. As the statute is neutral with respect to interstate commerce and is applied evenhandedly, it does not violate the Commerce Clause *per se*,

Exxon v. Governor of Maryland, 437 U.S. 117, 125-129 (1978); *Detroit Automotive Purchasing Service, Inc. v. Lee*, 463 F.Supp. 954, 961-964 (D.C. Md. 1978).

Furthermore § 660.10 does not burden the flow of commerce. The statute is directed, not to the flow of trust services into and out of Florida, but at the control of facilities within Florida that perform trust services. In the instant case, plaintiffs have failed to show that § 660.10 burdens the flow of commerce. Indeed, the only burden plaintiffs can demonstrate is that § 660.10 requires them to form a Florida subsidiary to perform trust business. However, a regulation or prohibition which peculiarly burdens a firm in interstate commerce, need not affect interstate commerce generally, for the Commerce Clause protects the interstate market, not particular interstate firms. *Exxon, supra*, 437 U.S. 117, 125-129.

In addition, there is no Commerce Clause impediment by requiring a foreign corporation to obtain a charter to do business in a particular state. *Railway Express v. Commonwealth of Virginia*, 282 U.S. 400, 444 (1931). The effect of § 660.10 is not discriminatory, but rather it is a reasonable and permissible manner of regulation of fiduciary activities, an area of traditional state concern. The states traditionally, historically and expressly been left by Congress with wide latitude in regulating trust business.

Defendant respectively submits that Florida Statutes § 660.10 should not have been casually stricken as violative of the Commerce Clause. It has been the law of Florida for over 50 years, consistent with the federal dual system of regulation of financial institutions. The district court's

ruling, if allowed to stand, would indeed have a significant impact on not only Florida, but many states with similar legislation.

Point III. The district court incorrectly applied the Commerce Clause principles established in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) in holding as unconstitutional a portion of Florida Statutes § 659.141(1) (1977) and Florida Statutes § 660.10 (1977).

The New Jersey legislation subject to attack clearly demonstrated an attempt to "slow or freeze the flow of commerce for protectionist reasons," by "erecting a barrier against the movement of interstate trade" [refuse], "to isolate the state from a problem common to many," [conservation of the State's remaining landfill space]. Thus, the New Jersey law fell squarely within the area that the Commerce Clause puts off limits to state regulation. There was no reason, apart from their origin to treat the waste differently.

In contrast, § 659.141(1) does not discriminate against a corporation on the basis of its origin or ownership. The statute says that a bank holding company or trust company "the operations of which are principally conducted outside this state," may not control banking businesses or closely related activities in the state. A foreign corporation whose operations were principally conducted in Florida could control a bank, trust company or investment advisory business. Conversly, a domestically incorporated business which had its principal operations outside the state would feel the same effect on the prohibition. The burden thus falls equally on foreign and domestic businesses alike.

Nor has § 659.141(1) "overtly moved to slow or freeze the flow of commerce." To the contrary, it only limits, but does not exclude out-of-state ownership of investment advisory offices. The limitations imposed are directed only to banks, bank holding companies and trust companies, the operations of which are principally conducted outside of Florida. The discrimination, if any, is not directed toward ownership or origin, as was the case in *Philadelphia, supra.*

A regulation or prohibition which peculiarly burdens a firm in interstate commerce need have no restrictive effect on other interstate businesses or on interstate commerce generally. The Commerce Clause protects the interstate market, not particular interestate firms. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). Absent same showing that the Florida laws inhibits the flow of goods or services in interstate commerce, the Commerce Clause does not compel the state to justify its action even though the laws may affect certain businesses or business practices in interstate commerce or alter the "structure" of the interstate market.

Fundamentally, one must also distinguish between the regulation of financial institutions and regulations of other more commonly known "articles" or services which may affect interstate commerce. Banking and trust involve matters of public trust and peculiar fiduciary responsibilities and have a significant impact on local and national affairs. The very nature of financial institutions themselves thus may require some burden on interstate commerce. To this extent, these distinguishing characteristics must be

considered in viewing banking and banking related legislation which are subjected to Commerce Clause attack.

Even if both Florida laws impermissibly burden interstate commerce, Congress, under its power over interstate commerce, has affirmatively consented to Florida's prohibition on the entry of foreign based bank holding companies and their subsidiaries into Florida. Such consent legitimately approves statutes by the states that may otherwise violate the Commerce Clause. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 (1946).

The district court, in rejecting this contention of congressional consent, misconstrues not only the scope of § 1842(d), but also the congressional intent and effect of the 1970 Amendments to the 1956 Act (Point I-A).

Prior to the 1970 Amendments, § 1842(d), in conjunction with 12 U.S.C. § 1843(c)(8), prohibited bank holding company expansion across state lines into "closely related" activities. Furthermore, the 1970 Amendments to § 1843(c)(8), retaining the "closely related" language and adding the "public benefits" test, did not alter this prohibition. The court similarly misconstrues the scope and intent of § 1846. It too prohibits bank holding company expansion across state lines into "closely related" activities. (Point II).

In conclusion, Florida Statutes §§ 659.141(1) and § 660.10 to the extent that it compliments § 659.141(1), express congressional policy allowing the states to have broad jurisdiction over interstate acquisitions within state boundaries by bank holding companies. The statutes do

not discriminate between state and federal banking institutions. Furthermore, the principal objective of the federal Bank Holding Company Act was to prevent concentration of economic power. The Florida laws are consistent with that policy. Through 12 U.S.C. §§ 1842(d) and 1846, Congress has given strength to the principle of competitive equality, and has enabled the states to regulate the concentration of economic power in bank holding companies through legislation at the local level. This Court should therefore reject the district court's holding that the Florida laws violate the Commerce Clause.

ARGUMENT

This case presents a variation on a recurring theme in modern banking law: the tension between federal regulatory statutes designed in part to limit bank activities, and attempts by banks and bank holding companies—often sanctioned by federal banking authorities—to compete in broader lines of business.[11] At issue is the right of each state to restrict or prohibit bank holding company expansion across state boundaries in banking related activities. Necessarily, the questions presented impact the important area of the federal-state dual banking system, the impact of which will reach not only state but national concerns. The case represents the first judicial decision, in the authors' knowledge, directly ruling on the constitutionality of state statues restricting or prohibiting bank holding company expansion across state lines in areas of investment

[11] See *Investment Company Institute v. Board of Governors of the Federal Reserve*, ____F.2d____, Case No. 77-1862, Slip Opinion 10, (D.C. Cir March 30, 1979), *amended* by Order dated July 13, 1979.

advisory services and trust business, activities deemed "closely related to banking" by the Federal Reserve Board. Of necessity, the district court below based its decision upon its interpretation of the congressional intent and purpose behind the enactment of the Bank Holding Company Act 1956, and the 1970 Amendments thereto.

In addition, the case touches upon an area of traditional state concern—the regulation of fiduciary activities within its borders. In question is the right of a state to bar a foreign corporation from doing trust business within its boundaries. Numerous statutes in various jurisdictions either exclude foreign banks generally from conducting business or deny foreign corporations the right to act as fiduciaries.[12]

Finally, in holding Florida Statutes §§ 660.10 and a portion of 659.141(1) (1977) *per se* unconstitutional as violative of the Commerce Clause, the district court misapplied the principles laid down by this Court in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

The defendant respectively submits that the district court below erred in its interpretation of the intent and

[12] See 1 *Scott on Trusts* § 96.6 (2d Ed. 1956); Anno., *Eligibility of Foreign Corporation to Appointment as Executor, Administrator or Testamentary*, 26 A.L.R. 3d 1019 (1969). For examples of decisions applying such exclusionary statutes, see *Farmers' Loan and Trust Co. v. Smith*, 74 Comm. 625, 51 A. 609 (1902); *Re Avery's Estate*, 45 Misc. 529, 92 NYS 974 (1904); *Gould v. Board of Home Missions*, 167 N.W. 777 (Neb. 1918). In question also is the right of a state to bar a foreign corporation from doing business within its boundaries as recognized in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 19, L.Ed. 357 (1869).

scope of the Bank Holding Company Act of 1956, as amended. In Point I of this brief we shall show that the Act of 1956, as amended, 12 U.S.C. §§ 1842(d) and 1846, not only recognizes and respects, but also authorizes the right of each state to restrict and forbid bank holding company expansion across state boundaries into banking *and* certain "closely related" activities located within its jurisdiction. In Point II we shall show that, as a proper incident of its traditional police power to regulate the performance of trust activites, a state may, without contravening the Commerce Clause, prohibit all entities, foreign and domestic, from engaging in certain trust business without acquiring a specific Florida charter and certificate of authority to perform trust business. In Point III, we shall show that the district court, in holding the subject Florida laws unconstitutional, incorrectly applied the Commerce Clause principles laid down in *Philadelphia v. New Jersey*, 437 U.S. 617.

I

THE BANK HOLDING COMPANY ACT OF 1956, AND AS AMENDED, AUTHORIZES, RECOGNIZES AND RESPECTS THE RIGHT OF EACH STATE TO RESTRICT BANK HOLDING EXPANSION ACROSS STATE BOUNDARIES, AND FORBID THE ENTRY OF OUTSIDE BANK HOLDING COMPANIES INTO BANKING AND CERTAIN "CLOSELY RELATED ACTIVITES" LOCATED WITHIN ITS JURISDICTION

A.

THE EXPRESS GRANT OF AUTHORITY TO THE STATES TO PROHIBIT OR EXCLUDE AN OUT-OF-STATE BANK HOLDING COMPANY FORM OWNING, ACQUIRING OR CONTROLLING A BANK IN A PARTICULAR STATE, 12 U.S.C. § 1842(d), INCLUDES AN IMPLIED GRANT OF AUTHORITY TO PROHIBIT OR EXCLUDE ENTRY INTO CERTAIN ACTIVITIES WHICH ARE DEEMED "CLOSELY RELATED" TO BANKING

In holding a portion of § 659.141(1) and § 660.10 *per se* in contravention of the Commerce Clause,[13] the district court specifically rejected the defendant's contention that Congress through the 1956 Act, as amended, has affirmatively consented to Florida's prohibition on the entry of foreign bank holding companies and their subsidiaries into the state. 461 F.Supp. at 1198-1200. The Douglas Amendment, 12 U.S.C. § 1842(d), prohibits a bank holding company from acquiring an additional bank in any state in which the business of its banking subsidiaries is not principally conducted, unless such state specifically authorizes such acquisition by language to that effect and not merely by implication.[14] The district court reasoned, after considering the 1956 Act, and amendments, that § 1846(d) does not consent to any state's attempt to bar an out-of-state bank holding company from acquiring other companies within the state which are engaged in activities "so closely related to banking or managing or controlling banks as to be a proper incident thereto," within the meaning of 12 U.S.C. § 1843(c)(8). 461 F.Supp. at 1199.

Defendant contends, however, that the ability to prohibit the acquisition of banks within a particular state

[13] Points II and III of Defendant's Brief will further discuss the Commerce Clause issue apart from the Bank Holding Company Act.

[14] See App. C herein.

must necessarily carry with it the ability to prohibit the acquisition of companies involved in closely related activities. Otherwise, a "loophole" would be created allowing bank holding companies to expand their operations into non-consenting states despite the congressional mandate giving the states power to exclude them. 461 F.Supp. at 1199. This argument is premised on the original congressional purpose behind enactment of the 1956 Act, that being to limit the concentration of economic power in the hands of bank holding companies.[15] However, in rejecting this argument, the district court looked to the 1970 Amendments to the Act and concluded, at 461 F. Supp. 1200,

> . . .[a]lthough defendant and amicus are correct concerning the general intent of the Act (preventing the concentration of financial power by bank holding companies), the purpose of the 1970 Amendments run counter to their arguments. The 1970 Amendments permit a bank holding company to obtain 'any company the activities of which . . . are so closely related to banking . . . as to be a proper incident thereto,' and not just companies 'all the activities of which are of a financial, fiduciary, or insurance nature,' as to the act provided prior to 1970. The congressional history of the amendment makes it clear that Congress in 1970 intended to expand the

[15] See *Alabama Ass'n of Ins. Agents v. Board of Governors*, 533 F.2d 224, 231 (5th Cir. 176); on *second petition for rehearing*. 558 F.2d 729 (5th Cir. 1977); *cert. denied* 435 U.S. 904 (1978); See *Board of Governors v. First Lincolnwood Corporation*, ____U.S. ____, 99 S.Ct. 505, 510 (1978); See S.Rep.No. 1095, pt. 1, 84th Cong., 1st Sess., 2 (1955), U.S. Code Cong. & Admin. News 1956, p. 2482.

> range of business activities in which bank holding companies could engage, giving them greater flexibility and latitude. (citations omitted)

This reasoning and interpretation of the Amendments is precisely where the district court not only misconstrues congressional intent, but overlooks other aspects of the 1956 Act. To put matters in proper perspective one must review the development of the Act in light of the Amendments thereto.

In tune with the primary congressional objective to prevent undue concentration of economic power in bank holding companies, the 1956 Act generally prohibited, with certain exceptions, a bank holding company from acquiring direct or indirect ownership or control of "any company which is not a bank." Section 4(a) of the 1956 Act, 12 U.S.C. § 1843(a)(1). However, under the 1956 Act, bank holding companies were permitted to conduct nonbank businesses, all the activities of which were of a "financial, fiduciary or insurance nature" which the Board of Governors of the Federal Reserve determined to be "so closely related to the business of banking as to be a proper incident thereto."[16] The phrase "closely related to the business of banking" was never explicitly elucidated in the legislative history of the original passage in 1956.[17] However, the Board interpreted this language restrictively, judging that it prohibited affiliation with any company

[16] 12 U.S.C. § 1843(c)(6)(1964, as amended, 12 U.S.C. § 1843 (c)(8) (Supp. V, 1965-69)

[17] See S.Rep.No. 1095, 84th Cong., 2d Sess. (1956); H.Rep.No. 609, 84th Cong., 2d Sess. (1956).

whose activities were not "directly and significantly connected" to the banking operations that the particular holding company was already engaged in.[18]

This narrow interpretation must be viewed in light of the Douglas Amendment, 12 U.S.C. § 1842(d) prohibiting bank holding company expansion into banking across state lines. If a bank holding company could not operate a bank subsidiary in another state, either because of an express prohibition of that state or lack of specific authority to do so, expansion into activities of a "financial, fiduciary or insurance nature" in that state would be prohibited because of the lack of a direct and significant connection to any bank subsidiary. In fact, there could be no direct and significant connection because there could be no bank subsidiary. Therefore, defendant submits that prior to the 1970 Amendments to the Act, § 1842(d) would have indirectly prohibited bank holding company expansion across state lines into activities of a "financial, fiduciary or insurance" nature. Any proposed subsidiary geographically removed from the bank holding company's banking subsidiary would simply not be a "direct and significant" connection in view of the Board's interpretation. Viewed in this light, § 1842(d) not only served to restrict expansion across state lines in areas of banking, but also in otherwise allowable activities. Congress did not need to focus on the nonbanking activities of holding companies because the

[18] See *Hearings on H.R. 6778 Before the House Committee on Banking and Currency*, 91st Cong., 1st Sess. 198-199 (1969) (Statement of William McChesney Martin, Jr., Chairman, Board of Governors, Federal Reserve System); see also *National Courier Assoc. v. Board of Governors*, 516 F.2d 1229, 1236 (D.C.Cir. 1975); see *Transamerica Corp.*, 1957 Fed. Reserve Bull. 1014.

Act required them to divest themselves of such subsidiaries except those of a "financial fiduciary or insurance nature" which were "closely related to the business of banking." 12 U.S.C. §§ 1843(a) and (c). The "closely related to the business of banking" restriction effectively prohibited bank holding company expansion across state lines into these otherwise permissible activities. This interpretation is surely consistent with the intent of the 1956 Act—to limit bank holding company expansion and concentration of economic power.

Now we turn to the 1970 Amendments to the 1956 Act. The crucial inquiry is whether the Amendments significantly changed the original intent of the 1956 Act, in relation to § 1842(d).

The most significant amendment was the elimination of the one-bank holding company loophole.[19] Nearly all bank holding companies were brought within the regulatory scheme of the 1956 Act, and thus one-bank holding companies which had been exempt,[20] were prevented from entering businesses not related to banking.

[19] 84 Stat. 1760, as amended, 12 U.S.C. § 1841(a); see S.Rep. No. 91-1084, pp. 2-4 (1970), U.S. Code Cong. & Admin. News 1970, p. 5519; see *Board of Governors v. First Lincolnwood Corp.* ——U.S.——, 99 S.Ct. 505, 512 (1978).

[20] The one bank holding company exemption was not an oversight. Congress did not deem it necessary to include one bank holding companies in the 1956 Act because as long as any given enterprise owned only one bank, it could not expand its banking activities structurally beyond the boundaries of any state.

The most controversial section of the 1970 Amendments is section 103,[21] amending § 1843(c)(8), upon which the district court placed great reliance. This section vests discretion in the Federal Reserve Board to decide the permissible activities in which any bank holding company may engage. In order to gain Board approval, the activity must meet two standards: (1) it must be so closely related to banking or managing or controlling banks as to be a proper incident thereto;[22] and (2) the activity must be one that can reasonably be expected to produce benefits to the public—greater convenience, increased competition or gains in efficiency—that outweigh possible adverse effects—undue concentration of resources, decreased or unfair competition, conflicts of interest or unsound banking practices.

The retention of the "closely related" test is highly significant. In an attempt to escape from its past restrictive interpretations of this provision, the Federal Reserve Board and those who favored giving bank holding companies greater latitude, recommended that the phrase "functionally related" be substituted for the "closely related" language of § 1843(c)(8). Initially, both the Senate

[21] Bank Holding Company Amendments of 1970, § 103, 12 U.S.C. § 1843(c)(8) (1970); see comment, *Implementation of the Bank Holding Company Act Admendments of 1970: the Scope of Banking Activities*, 71 Mich. L. Rev. 1970 (1973).

[22] Section 1843(c)(8) previously read, "so closely related to the business of banking."

and House included this new language, although their purposes differed significantly.[23]

The struggle between the two houses culminated in the rewriting of the bill by the Conference Committee "of great controversy and grinding negotiations and many, many offers and counter offers in an attempt to reach agreement."[24] The product was, as one court viewed it, the "type of ambigous compromise that characteristically results when parties who deeply disagree are under intense pressure to reach a mutually acceptable accommodation."[25] Ultimately, the list of prohibited activities was deleted from the Act, in return for a retention of the pre-1970 "closely related" language. The 1956 Act's phrase "the business of banking" was changed to read simply "banking."

[23] The Senate apparently adopted the "functionally related" language to provide the greater flexibility sought by the Board. S.Rep.No. 1084, 91st Cong., 2d Sess. 12 (1970). However, the House included a "negative laundry list" specifically listing certain prohibited activities. 115 Cong. Rec. 32,890 (1969). The House, favoring restricting the nonbank activities of bank holding companies to the standards of the 1956 Act believed that since the House bill was rewritten to include the "laundry list" and other restrictive provisions, an expansive interpretation of the "functionally related" language was precluded, and the deletion of that language was therefore unnecessary. See *e.g. id.* at 32,894 (remarks of Rep. Wright Patman).

[24] 116 Cong.Rec. 41963 (1970) (remarks of Rep. Sullivan).

[25] See *Investment Company Institute v. Board of Governors, supra*, slip opinion 29, ____F.2d____, Case No. 77-1862 (D.C. Cir. March 30, 1979). For a detailed discussion of the events leading up to the final language, see Legislative note, *The Bank Holding Company Act Amendments of 1970*, 39 Geo. Wash. L. Rev. 1200, 1219-1223 (1971); Chase, *The Emerging Financial Conglomerate; Liberalization of the Bank Holding Company Act*, 60 Geo. L. J. 1225, 1237-1239 (1972).

Although the conferees agreed upon the language of the new section, they differed sharply in their interpretation. Four of the seven House conferees emerged to state that the resulting legislation should "be construed to mean that the Congress was not convinced that such expansion and liberalization was justified," Conference Report, 1970 U.S. Code Cong. & Adm. News at 5572, see also 116 Cong. Rec. 41,952, 41,961 (1970) (remarks of Rep. Patman), and that the new section retained "the basic content and the essential test found in the 1956 Act." 116 Cong. Rec. H 11,691 (daily ed., Dec. 15, 1970). Chairman Wright Patman, leading the House managers of the bill, stated that with the insertion of a second test—the "public benefits" test—the new requirements are a more difficult standard than those of the 1956 Act. 116 Cong. Rec. 41,950-51 (1970). He reasoned that the addition of this test to the closely related language required the Federal Reserve Board to use two separate tests in deciding cases under this section.[26] Even if the activity is found by the Board to be closely related to banking, under this view, it must also determine whether it meets the public benefits test. Finally, Chairman Patman stated that the new amendments require a direct connection between the proposed activities and those that banks were already authorized to perform. 116 Cong. Rec. 41,952-53 (1970).

The Senate conferees and the minority House conferees, however, argued that even the compromise bill

[26] See *Alabama Ass'n of Ins. Agents v. Board of Governors, supra,* 533 F.2d at 235, and *Florida Ass'n of Ins. Agents v. Board of Governors,* 591 F.2d 334, 335 (5th Cir. 1979), specifically recognizing this two-prong test: (1) whether the activity is "closely related," and if so, (2) whether it meets the "public benefits" test.

which survived the conference represented a liberalization of the law.[27] They argued that the amendments would free the Board of the restrictions of the 1956 Act and would allow activities to be related to the business of banking generally, rather than continue the concept that such activities must be related to the specific business carried on by the subsidiary banks of the particular holding company involved. 116 Cong. Rec. 41,953-54 (1970) (remarks of Congressman Widnall); 116 Cong. Rec. 42,424 (1970) (remarks of Senator Sparkman). They further argued that "public benefits" should be weighed in conjunction with the determination that a particular activity was closely related to banking and not as an independent criterion of permissible nonbank activities. 116 Cong. Rec. § 20,640 (daily ed. Dec. 18, 1970).

Courts have disagreed as to implications of the 1970 Amendments, and as to congressional intent and purpose behind them. Compare *National Courier Association v. Board of Governors,* 516 F.2d 1229, 1236 (D.C. Cir. 1975), and *Investment Company Institute v. Board of Governors,* ____F.2d____, Case No. 77-1862 (D.C. Cir., March 30, 1979), at page 32 of slip opinion, with *Alabama Ass'n of Ins. Agents v. Board of Governors, supra,* 533 F.2d 224, at 238-239. The Fifth Circuit in *Alabama Ass'n of Ins. Agents,* at 239, specifically rejected any contention that Congress intended to expand the Board's latitude in substantial degree. The court did note that the deletion of the requirement that the nonbanking activity be of a "financial,

[27] 116 Cong. Rec. 41952-53 (remarks of Rep. Widnall; *id.* 42422, 42424 (remarks of Sen. Sparkman); *id.* 42431 (remarks of Sen. Bennett).

fiduciary, or insurance nature" and that it relate to the "business of banking", represented, at best, a modest broadening of the Board's discretion. However, the court went on to say, at 239,

> Any liberalization of the standards affected by these *minor* wording changes was largely *if not wholly* offset by the Conference Committee's rejection of the "functionally related standard" and the addition of the public benefits test. (E.S.)

The court, at footnote 15 at p. 238-239, did note that the deletion of "business of banking" was primarily sought by the Board,

> . . . to make it clear that nonbanking activities need not relate to the particular banking business of the applicant but to banking in general, thus permitting activities in areas geographically removed from the applicant's bank operations. See Conference Report, 1970 U.S. Code Cong. & Admin. News, pp. 5566-67.

As explained by the Conference Report, any attempt to attach great significance to the deletion of the "financial, fiduciary or insurance" language would be inconsistent with the legislative history which clearly indicates that Congress intended no great significance to be given to this deletion from the present law. *Id.* p. 5566. The Report also noted, at p. 5572, that the elimination of the term "the business of" should be interpreted to mean that there must be a direct and significant connection between the proposed activities and the kinds of activities that banks

generally now carry on, *i.e.* closely related to banking in general.

This last statement would seem to reflect a relaxation of the former requirement that there must be a relationship between the particular activities of the company proposed to be acquired and the business of the particular bank holding company. However, here is certainly nothing in the legislative history to suggest that any relaxation of geographic restrictions, (permitting activities in areas geographically removed from a bank holding company's bank operations), necessarily affect restrictions on expansion *across* state boundaries.

At best, the deletion of the phrase, "the business of banking" may have removed, to a limited degree, certain geographic restrictions as to a bank holding company's expansion within a state. However, in the context of § 1842(d), it would seem incongruous to interpret the amendment so expansively as to allow bank holding company expansion across state lines, when such was impermissible under the 1956 Act.

Indeed, § 1842(d) was not even discussed during the intensly debated legislative developments of the 1970 Amendments. Nor should it have been. Congress, wishing to limit the concentration of economic power in the hands of bank holding companies, expressly prohibited bank holding company bank expansion across state lines, 12 U.S.C. 1842(d), and prohibited entry into nonbanking areas except as to "closely related" businesses. 12 U.S.C. § 1843(a). The 1970 Amendments did not dilute either

of these concepts, contrary to the conclusion of the district court below.[28]

Because the 1970 Amendments did not affect the original intent of the 1956 Act—to prevent the concentration of financial power by bank holding companies—it is quite consistent to conclude that the state's ability to prohibit the acquisition of banks must necessarily carry with it the ability to prohibit the acquisition of companies involved in closely related activities. To hold otherwise would allow a bank holding company to do indirectly what it could not do directly.

In addition, defendant respectfully submits that 12 U.S.C. § 1846, Reservation of Rights to States, authorizes, recognizes and respects the right of each state to forbid the entry of out-of-state bank holding companies into "closely related" activities located within its boundaries. We shall develop this argument below.

B.

12 U.S.C. § 1846, RESERVATION OF RIGHTS TO THE STATES, AUTHORIZES, RECOGNIZES, AND RESPECTS THE RIGHT OF EACH STATE TO FORBID THE ENTRY OF OUTSIDE BANK HOLDING COMPANIES INTO ACTIVITIES "CLOSELY RELATED" TO BANKING, LOCATED WITHIN ITS BOUNDARIES.

In addition to the argument contained in I-A, above, defendant respectfully submits that 12 U.S.C. § 1846

[28] During enactment of the 1970 amendments, Congress was still deeply concerned that the economy was becoming structured along the lines of the Japanese "Zaibatsu" system, in which economic power was concentrated in a few gigantic power centers. See *Investment Company Institute, supra*, p. 39 of slip opinion and note 67.

authorizes, recognizes and respects the right of each state to forbid the entry of out-of-state bank holding companies into activities "closely related" to banking, within its boundaries. 12 U.S.C. § 1846, enacted at the inception of the 1956 Act, provides:

> Reservation of Rights to States. The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any state from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

The legislative history, together with judicial interpretations of § 1846 confirm that the section specifically reserves to the states the broad power sufficient to bar bank holding companies or their subsidiaries from extending their domains.

As discussed in Point I-A above, the original congressional purpose behind enactment of the 1956 Act was to limit the concentration of economic power in the hands of bank holding companies and prevent bank holding companies from entering business not related to banking.[29] Congress recognized that bank holding companies are not evil of themselves. However, because of the importance of the banking system to the national economy, adequate safeguards should be provided against undue concentration of control of banking activities.[30] Thus, under the

[29] See note 15, *supra*.

[30] See S.Rep. No. 1095, pt. 1, 84th Cong. 1st Sess., 2, (1955), U.S. Code Cong. & Admin. News 1956, p. 2482.

Act, the growth of bank holding companies in the banking field would be regulated but not prohibited.[31]

However, at the same time, Congress expressly preserved to the states a right to be more restrictive regarding the formation or operation of bank holding companies within their respective borders than the Federal authorities can be or are under the Act. 12 U.S.C. § 1846. Under such a grant of authority, each state may, within the limits of its proper jurisdictional authority, be more severe on bank holding companies as a class than (1) the Act empowers the federal authorities to be, or (2) such federal authorities actually are in their administration of the provisions of the Act.[32]

Of significance, as indicated in the language of the Section itself, Congress makes clear that there is a reservation of the rights of any state for the exercise of present and future powers with respect to not only banks and bank holding companies, but also their subsidiaries. As indicated in the legislative history, Congress, by enactment of § 1846, not only recognized but also granted the authority for a state to exercise these powers in a manner more restrictive than the provisions of the Act. See note 30.

Courts have consistently recognized and construed § 1846 as granting this broad power to the states, *Whitney*

[31] *Id.* pp. 2484, 2492.

[32] *Id.*, pp. 2492, 2504.

National Bank v. Bank of New Orleans,[33] 379 U.S. 411, 419, 424, 428, 430 (1956); *related case, Whitney National Bank v. James,* 189 So.2d 430, 441, 442 (C.A. La. 1966), *affirmed* 191 So.2d 140 (La. 1966); *Iowa Independent Bankers v. Board of Governors,* 511 F.2d 1288, 1291, 1296, (D.C. Cir. 1975), *cert. denied,* 423 U.S. 875 (1975); *Braeburn Securities Corp. v. Smith,* 15 Ill. 2d 55, 153 N.E. 2d 806, 810, (Ill. 1958), *appeal dismissed,* 359 U.S. 311 (1959); A.2d 236 (N.H. 1959); *Florida Ass'n of Ins. Agents v. Board of Governors,* 591 F.2d 334, 342, (5th Cir. 1979).

To date, most judicial decisions construing or discussing § 1846, have concerned state legislation designed in large part to prohibit the formation of bank holding companies, or to restrict entry into state banking.

In *Whitney National Bank v. Bank of New Orleans, supra,* at 419, this Court found that the Federal Reserve Board could not approve a holding company arrangement involving the organization and opening of a new bank if the opening of the bank, by reason of its ownership by a bank holding company would be prohibited by a valid state law.[34]

In *Opinion of the Justices,* 151 A.2d 136 (N.H. 1959), it was held that the legislature of New Hampshire could

[33] Mr. Justice Douglas, in his dissent as to the jurisdictional holding, noted, at 428, ". . . § 1846 specifically reserves to the States a broad power seemingly sufficient to bar bank holding companies or their subsidiaries from extending their domains."

[34] Indeed, the Board, in the instant case, denied the plaintiffs' application on the fact that the proposal would be prohibited by State law. See also *Trans-Nebraska Co.,* 49 Fed Res. Bull. 633, 638 (1963).

prohibit bank holding companies from doing business in the state and prohibit the formation in New Hampshire of bank holding companies because "the business of banking bears such a relation to the economic security of the public that it is a proper subject of regulation by the state in the exercise of its police power." *Id.* at 238. See *Braeburn Securities Corporation v. Smith, supra,* 153 N.E. 806, holding that the state interest in prohibiting branch banking permitted the Illinois legislature to ban the use of bank holding companies with the state, while exempting previously existing bank holding companies so as to not require divestiture of existing holdings.[35]

However, a recent decision by the Fifth Circuit Court of Appeals has noted the importance of state legislation as it affects bank holding company expansion into "closely related" activities.

In *Florida Ass'n of Ins. Agents v. Board of Governors, supra,* 591 F.2d 334, the Fifth Circuit construed § 1846 and § 1843(c)(8) in relation to applications of three bank holding companies to engage in "closely related" activities of the insurance business.[36] An administrative law judge

[35] See also *Grandview Bank & Trust Co. v. Board of Governors,* 550 F.2d 415, 419-20 (8th Cir. 1977), *cert. denied,* 434 U.S. 821 (1977).

[36] 12 C.F.R. § 225.4(a)(9) (1976). Certain sections of these regulations were previously struck down in *Alabama Ass'n of Ins. Agents, supra,* 533 F.2d 224. However, the "closely related" test and the validity of § 225.4(a)(9) was not at issue in *Florida Ass'n.* The case involves the second requirement of the 1956 Act, whether the Board has carried out its statutory obligation under 12 U.S.C. § 1843(c)(8) to determine whether the selling of insurance by the applicants meets the public benefits test.

was assigned to conduct a hearing after formal protests were filed. At the time when the hearings were conducted, Florida had by statute diminished the ability of banks and bank holding companies to engage in the insurance business. Florida Statutes § 626.747 (1977). 591 F.2d at 336. The administrative law judge recommended that the applications be approved, subject to certain conditions. *Id.* at 336.

Subsequent to the administrative law judge's decision, but prior to the Board's review thereof, the Florida Legislature passed Florida Statutes § 626.988(2) (1977), which prohibits banking institutions from engaging in insurance agency activities. In its final order approving the proposals, the Board noted the change in Florida law, but felt that it was not obligated to assess carefully whether the new statute altered its determination of net public benefits under section 4(c)(8) of the Act. 591 F.2d at 337.

In reversing and remanding the case back to the Board, the court noted, 591 F.2d at 337,

> To its credit, the Board recognized that the change in Florida law had seriously restricted the range of insurance activities legally open to banks and bank holding companies in Florida. [citing § 1846]. We disagree, however with the Board's view that it was not obligated to assess carefully whether the new statute altered the calculus of net public benefits under section 4(c)(8).

The court concluded that the Board could not follow its mandate under § 1843(c)(8) without considering the effect of a new Florida law as to the public benefits test,

citing *Whitney National Bank, supra.* The court held that this Court's ruling in *Whitney,* explaining the proper role of the Board in making a similar public benefits determination under a companion section of the 1956 Act, §§ 1842 (c)(4) and (5) (1958),[37] [acquisition of a bank], was equally applicable to a determination of the public benefits test under § 1843(c)(8),[38] [engaging in activities "closely related" to banking]. In remanding, the Fifth Circuit further reasoned, 591 F.2d at 342,

> The Court [in *Whitney*] found that the determination as to the 'applicability and effect' of state law on public benefits criteria under the Act is 'the very type of question that Congress envisioned as being resolved in the first instance by the Board.' 379 U.S. at 425, . . . The Court further stated that it *would hardly be consistent with the public interest to approve a plan which violated the law. Id.* at 418-19, . . . The basic principle is clear that the Board cannot ignore the applicability and effect of state law inasmuch as it bears upon the public interest determination required by the Act. 12 U.S.C. § 1843(c)(8). The Board has done so here. (E.S.)

[37] 12 U.S.C. §§ 1842(c)(4) and (5) (1958) directed the Board to consider "the convenience, needs and welfare of the communities and the area concerned" and ". . . whether or not the effect of such acquisition [of shares in a bank by a bank holding company] . . . would be to expand the size or extent of the bank holding company system involved beyond the units consistent with . . . the public interest."

[38] See discussion at p. 30 of this Brief.

It is significant that the Fifth Circuit applied the *Whitney* doctrine to a bank holding company's application to engage in activities "closely related" to banking, as determined by the Board. The court clearly focused on the two-step determinative inquiry for every bank holding company application to engage in nonbanking activities: (1) whether it meets the "closely related" test, and if so, (2) whether it meets the "public benefits" test, § 1843(c)(8).[39] A crucial determining factor for the Board to consider under this "public benefits" test, is whether the proposal violated state law. If so, then approval is necessarily precluded because "it would hardly be consistent with the public interest to approve a plan which violated the law." *Florida Ass'n of Ins. Agents, supra,* 591 F.2d at 342, citing *Whitney, supra,* 379 U.S. at 418-19.

It is § 1846, authorizing, recognizing and respecting a state's right to bar banking holding company expansion, which necessarily requires the Board to consider and follow state law[40] in determining a "closely related" activity proposal under § 1843(c)(8).

Clearly § 1846 enables states to place much greater restrictions on holding companies than would otherwise apply under the 1956 Act, as evidenced by legislative history and judicial decisions discussed above. This grant of authority[41] is sufficient to allow state legislation prohibiting

[39] See note 26, *supra,* at p. 32, and accompanying text.

[40] Indeed, the court in *Florida Ass'n of Ins. Agents, supra,* 591 F.2d at 342, remanded the case to the Board, instructing it, in part, to require the applicants to amend their proposals in a manner consistent with Florida law.

[41] See note 32, *supra,* at p. 38, and accompanying text.

formation of bank holding companies and their subsidiaries. Lesser bans, such as those in the subject Florida Statutes on certain types of holding companies and services, should also fall within the terms of § 1846. To hold otherwise, contravenes the express congressional intent, authorizing, recognizing and respecting a State's right to restrictively regulate or prohibit bank holding compan expansion.

Therefore, the district court clearly misconstrues § 1846 when it concludes that the language of that section "accomplishes nothing more than to assure that the states will not be deemed dispossessed of whatever regulatory authority they exercised over banks and bank holding companies prior to passage of the Bank Holding Company Act." 461 F.Supp. at 1199.[42] To the contrary, the Act specifically speaks of terms of "such powers and jurisdiction which it now has or may hereafter have." (App. E herein). By setting the lower limits of restrictions on bank holding companies and enacting § 1846, Congress has allowed States to set higher limits, including outright bans.[43]

[42] In Point III of this Brief, defendant will fully discuss the district court's conclusion that § 1846 does not pass on to the States the power to adopt regulations which may otherwise be contrary to the Commerce Clause.

[43] See Jessee and Seelig, *Bank Holding Companies and the Public Interest*, at 140 (Lexington Books ed. 1977) noting, . . . Section 7 of the Bank Holding Company Act [12 U.S.C. § 1846] recognizes the right of each state to forbid the entry of outside bank holding companies into nonbanking activities located within its jurisdiction. The cast majority of the states do permit such entry. Accordingly, the most limiting restriction on nonbank expansion arises from the act's requirement that any proposed nonbank endeavor be closely related to banking and yield benefits to the public that outweigh possible adverse effects.

II

AS A PROPER INCIDENT OF ITS TRADITIONAL POLICE POWER TO REGULATE THE PERFORMANCE OF TRUST ACTIVITIES, A STATE MAY, WITHOUT VIOLATING THE "COMMERCE CLAUSE" OF THE UNITED STATES CONSTITUTION, RESTRICT SUCH ACTIVITIES TO DOMESTIC CORPORATIONS THAT HAVE OBTAINED A SPECIFIC CHARTER AND CERTIFICATE OF AUTHORITY TO PERFORM TRUST BUSINESS.

Florida Statutes § 660.10 (1977) prohibits all corporations, except banks and trust companies incorporated under the laws of Florida and having trust powers, and except national banking associations located in Florida and having trust powers, from performing certain fiduciary and trust activities. These activities basically relate to acting as (1) executor or administrator of an estate, (2) guardian of a person, (3) trustee under a testamentary instrument, (4) trustee of real estate, and (5) trustee under a deed of trust. (App. B herein).

It has been the governing law of Florida for over 50 years,[44] and is similar to statutes enacted in other juris-

[44] This statute has been on the books in essentially its present form since 1937. See 1937 Ch. 18399, Laws of Florida, Acts of 1937. Predecessor statutes going back to at least 1923 barred foreign corporations from exercising trust powers in this State. Chapter 8531, Acts of 1921, as amended by Chapter 9287, Acts of 1923. See also *Taylor v. Toledo Trust Co.*, 160 So. 366 (Fla. 1935).

dictions for similarly lengthy periods. Numerous statutes in various jurisdictions either exclude foreign banks generally from conducting business or deny foreign corporations the right to act as fiduciaries.[45]

The Florida statute clearly governs an area traditionally regulated by the states. See *Blaney v. Florida Nat. Bank*, 357 F.2d 27 (5th Cir. 1966). By striking § 660.10, as unconstitutional, the district court places this entire area in doubt.

In holding § 660.10 as violative of the Commerce Clause, the district court failed to consider it in its proper context. Plaintiffs' attack on the law can only be viewed in conjunction with § 659.141(1). The focus is clearly on § 659.141(1), and § 660.10 is attacked only insofar as it compliments § 659.141(1). See *BT Investment v. Lewis*, 559 F.2d 950, 955, note 28, (5th Cir. 1977). Ownership, acquisition and control of a corporation seeking to do Florida trust business is irrelevant in § 660.10. Therefore, the statute itself would not have prohibited BTNYC from doing the very thing it seeks to do, *i.e.* establish a *de novo* Florida corporation to perform trust business. It is only in connection with § 659.141(1),[46] that such activity is prohibited; and then only because BTNYC is a bank holding company whose operations are principally conducted outside of Florida. Thus the district court has gone too far in declaring § 660.10 unconstitutional. This shall appear even more evident as the district court's decision is analyzed in light of Commerce Clause principles.

[45] See note 12, *supra*, at p. 23.

[46] Defendant will specifically discuss the Commerce Clause in conjunction with § 659.141(1) in Point III of this Biref, p. 53.

Although the Commerce Clause grants Congress the authority "to regulate Commerce . . . among the several states," it has long been understood that in the absence of conflicting federal legislation on a subject of potential regulation, the states retain a "residuum of power" to adopt their own regulations concerning that subject. *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 (1977); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945); *BT Investment v. Lewis*, 461 F.Supp. at 1195. However, in the absence of a conflicting federal statute, this Court has construed the Commerce Clause as a restriction on permissible state regulation. See *Hughes v. Oklahoma*, ____U.S.____, 99 S.Ct. 1727, 1731 and note 3 (1979).

If a statute facially discriminates against out-of-state businesses or which protects and promotes local firms to the detriment of interstate commerce (simple economic protectionism), then it is unconstitutional without any further consideration. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). The district court, in striking § 660.10 found that the statute evidenced "simple economic protectionism," and therefore was *per se* invalid. 461 F.Supp. at 1196. To this extent, the district court misconstrued § 660.10 and its effect on interstate commerce.

In holding § 660.10 as a "basically protectionist measure," the district court found that "Section 660.10 . . . cordons off Florida trust companies from competition by out-of-state concerns." 461 F.Supp. at 1196. To the contrary, § 660.10 prohibits not only out-of-state corporations from performing certain fiduciary activities, it prohibits all corporations, foreign and domestic, except Florida trust companies with trust powers and national banks located in

Florida with specific trust powers. Apart from the prohibition of § 659.141(1), § 660.10 does not prohibit foreign corporations from competing, through a Florida subsidiary, with Florida trust companies or Florida banks having trust powers.

Section 660.10 merely requires an entity wishing to engage in certain trust activities to incorporate in Florida, and obtain trust powers. Trust powers can only be obtained through licensing and chartering provisions of Florida Statutes § 659.05 (1977), after the Department of Banking and Finance finds that the proposed trust company has complied in good faith with all the requirements of law. Therefore, § 660.10, apart from § 659.141(1), does not "cordon off Florida trust companies from competition by out-of-state concerns." It merely requires an out-of-state entity to establish a Florida subsidiary corporation and obtain a Florida trust charter, if it wants to engage in trust activities in Florida.

These trust licensing requirements and § 660.10 are neutral in their effect on business, both within and without Florida. Nothing in this requirement either discriminates against out-of-state businesses or protects local interests. If § 660.10 discriminates in any way, it is not against any particular segment of commerce, but rather against a particular way of doing business. As the challenged statute is neutral with respect to interstate commerce and is applied evenhandedly with regard to all segments of commerce, the statute does not violate the Commerce Clause *per se*. See *Exxon v. Governor of Maryland*, 437 U.S. 117, 125-129 (1978); *Detroit Automotive Purchasing Services, Inc. v. Lee*, 463 F.Supp. 954, 961-964 (D.C. Md. 1978).[47]

Having demonstrated that § 660.10 does not *per se* violate the Commerce Clause, the next critical inquiry is whether the statute burdens the flow of commerce. This determination is critical, because until plaintiffs demonstrate some burden on interstate commerce, even the *Pike* test does not apply.[48] This test is as follows:

> "Where the statute regulates evenhandedly to effectuate a ligitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with lesser impact on interstate activities." 397 U.S. at 142

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[47] In *Detroit Automotive*, a Maryland statute regulating the sale of automobiles through a comprehensive system of licensing, was held valid under the Commerce Clause on the grounds that the licensing provisions did not discriminate against any particular segment of commerce, but rather against a particular way of doing business. Similarly, if it discriminates at all, it only discriminates against a particular way of doing trust business.

[48] Where legislative objectives are credibly advanced and there is no patent discrimination against to interstate trade, this Court has adopted a much more flexible approach, the general contours of which were outlined in *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970).

On the basis of the cases decided after *Pike*, its balancing test currently reflects the law with respect to state interference with interstate commerce in violation of the Commerce Clause. See *Hughes v. Oklahoma*, ____U.S. ____, 99 S. Ct. 1727, 1736 (1979); *Raymond Motor Transportation v. Rice*, 434 U.S. 429, 440-42 (1978); *Great A & P Tea Co. v. Cottrell*, 424 U.S. 366, 370-72 (1976). However, in none of the cited cases does the Court proceed without first finding some burden on interstate commerce, however small. Indeed, it is axiomatic that no state provision can be invalidated as offending the Commerce Clause unless there is some demonstrated or apparent nexus between the challenged provision and interstate commerce.

As noted in *Hughes v. Oklahoma, supra*, 99 S.Ct. at 1736, "The burden to show discrimination [against commerce] rests on the party challenging the validity of the statute." In the instant case, plaintiffs have failed to show that § 660.10 burdens the flow of commerce. Indeed, plaintiffs cannot show such burden. Section 660.10 is directed, not to the flow of trust services into and out of Florida, but at the control of facilities within Florida that perform trust services. The only burden plaintiffs can demonstrate is that § 660.10 requires them to form a Florida subsidiary to perform trust business.

While a licensing and chartering requirement may impose some burden on plaintiffs, it does not immediately follow that the statute thereby burdens interstate commerce. A regulation or prohibition which peculiarly burdens a firm in interstate commerce need not affect interstate commerce generally. See *Exxon Corp. v. Governor*

of Maryland, supra, 437 U.S. 117, 125-129. As stated in *Exxon*, at 129, "the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations."

Therefore, § 660.10 does not contravene the Commerce Clause because it does not burden the flow of commerce.

In addition, there is nothing impermissible in the effect of § 660.10. Trust business is primarily local in nature, as evidenced by the very activities enumerated in § 660.10. (App. B). As such, the State of Florida clearly has an important regulatory concern in light of the special nature of fiduciaries activities. In requiring Florida incorporation and specific trust chartering, Florida has merely effected a permissible method of regulation.

There is no constitutional impediment to a state refusing to grant a foreign corporation a permit to transact local business without taking out a charter from the jurisdiction within which that business is to be done. *Railway Express Agency v. Commonwealth of Virginia*, 282 U.S. 400, 444 (1931). In *Railway Express*, this prohibition was sustained on a Commerce Clause attack, as applied to a foreign corporation wishing to carry on within the state on extensive interstate and local express business. See *Atlantic Refining Co. v. Commonwealth of Virginia*, 302 U.S. 22, 26, at note 2 (1937).

The Court, in *Railway*, rejected the Commerce Clause attack, stating, 282 U.S. at 444:

Virginia is not attempting to go beyond its power

> by indirection or to take anything from anybody. It simply is refusing to grant a foreign corporation a permit to transact local business without taking out a charter from the jurisdiction within which that business must be done. There is no substantial evidence that the refusal would improse a burden on interestate commerce, and it is presumed to be constitutional . . . We may add that . . . the difficulties created by . . . Virginia probably will not prove hard to overcome when it is found that they must be met.

Florida Statutes § 660.10, by analogy, does not "take anything from anybody," nor is Florida "attempting to go beyond its power by indirection." The statute merely refuses to grant any corporation, foreign or domestic, authority to transact local trust business without "taking out a specific trust charter from the jurisdiction within which that business must be done." It is not a discriminatory prohibition or exclusion, but rather a reasonable and permissible manner of regulation of fiduciary activities, an area of traditional state concern.

The Federal Reserve Board, in determining that trust business is an activity "closely related to banking," has specifically recognized a state's authority to regulate the manner in which trust business is performed. Regulation 12 C.F.R. § 225.4(a)(4), (App. F), specifically authorizes trust activities "that may be performed or carried on by a trust company in the manner authorized by Federal or State law." This is surely consistent with the system of dual federal and state regulation in the banking area, a system which Congress has endeavored to preserve over

the years. See *BT Investment v. Lewis*, 461 F.Supp. at 1200.

The states have traditionally, historically and expressly been left by Congress with wide latitude in regulating not only financial institutions in general, but specifically the trust business. See 12 U.S.C. §§ 92a(a) (1978) authorizing a national bank to act as fiduciary only "when not in contravention of state or local law."[49]

The statute does not impermissibly discriminate against plaintiffs nor other foreign corporations, but merely reflects a proper manner of effectively regulating trust business in Florida, consistent with the dual system of regulation of financial institutions. It imposes no impermissible burden on interstate commerce. Therefore, defendant respectfully submits that § 660.10 should not have been casually stricken as violative of the Commerce Clause.

III

THE LOWER COURT INCORRECTLY APPLIED THE COMMERCE CLAUSE PRINCIPLES ESTABLISHED BY THE COURT IN *PHILADELPHIA V. NEW JERSEY*, IN HOLDING AS UNCONSTITUTIONAL A PORTION OF FLORIDA STATUTES § 659.141(1) (1977) AND FLORIDA STATUTES § 660.10 (1977)

[49] See *American Trust Co. v. South Carolina*, 381 F.Supp. 313, 323 (D.C. S.C. 1974). A South Carolina statute which prohibits corporations organized in contiguous states from acting as a testamentary trustee for a South Carolina decedent was held valid under a Commerce Clause attack because it applied equally to state and national banks.

In holding a portion of § 659.141(1) as violative of the Commerce Clause, the district court heavily premised the decision on its interpretation and application of *Philadelphia v. New Jersey*, 437 U.S. 617 (1978). As with § 660.10, the court found that the statute was *per se* unconstitutional, as a "basically protectionist measure." 461 F. Supp. at 1196. But here too as with § 660.10, the court misapplied *Philadelphia* in reaching this conclusion.[50] An analysis of the facts in *Philadelphia*, in light of § 659.141(1), will show how the court misconstrues and misapplies the Commerce Clause principles as enumerated by this Court.

In *Philadelphia*, the court was concerned with a New Jersey statute which basically prohibited the importation of most solid or liquid waste which originated or was collected outside of the state. New Jersey effectively closed its borders to all waste from other states, with a few narrow exceptions. The purpose of the New Jersey law, as set out in the statute itself, was to protect the quality of the environment of New Jersey, recognizing at the same time that the available and appropriate landfill sites within the state were being diminished. However, certain passages of legislative history suggested that the problem addressed by the law was primarily financial: stemming the flow of out-of-state waste into certain landfill sites will extend their lives, thus delaying the day when New Jersey cities must transport their waste to more distant and expensive sites. 98 S.Ct. at 2536.

In holding the statute as a "protectionist measure," the court stated, at 2537,

[50] See Point II of Appellant's Brief, pp. 47-49.

> "The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation. On its face, it imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space . . . [T]he State has overtly moved to slow or freeze the flow of commerce for protectionist reasons . . . What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.

Clearly, this type legislation did indeed establish discrimination against articles of commerce coming from outside the state. There was no reason, apart from their origin, to treat them differently.

However, in the instant case, § 659.141(1) does not discriminate against a corporation on the basis of its origin or ownership. The statute says that a bank holding company or trust company "the operation of which are principally conducted outside this state" may not control businesses performing banking and closely related activities in the state. A foreign bank corporation whose operations were principally conducted in this state could control a bank, trust company or investment advisory business. Conversely, a domestically incorporated business which had its principal operations out of the state would feel the same effect of the prohibition. The burden thus falls equally on foreign and domestic businesses alike.

Nor has § 659.141(1) "overtly moved to slow or freeze the flow of commerce." It only limits, but does not ex-

clude, out-of-state ownership of investment advisory offices. The statute would allow a nonbanking or nontrust out-of-state corporation to open an investment advisory office in Florida to compete with Florida investment advisors.

While plaintiffs may argue that the restrictions of § 659.141(1) impose a burden on them, and that their operations may have an impact on interstate commerce, it does not immediately follow that the statute thereby burdens interstate commerce. See *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117(1978). A regulation which peculiarly burdens a firm in interstate commerce need have no restrictive effect on other interstate businesses or on interstate commerce generally.

Recently, in *Exxon Corp,* 437 U.S. at 129, the Court reaffirmed the principle that "the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations. In *Exxon,* a Maryland law was upheld which prohibited oil refiners from operating retail service stations and required them to extend uniform "voluntary allowances" of gasoline to all stations they supplied. Even though the divestiture provision imposed severe burdens on certain interstate businesses, in some cases resulting in the withdrawal of several refines from the Maryland market altogether, the Court expressly found that interstate commerce nevertheless remained unaffected.[51]

[51] The appellants in *Exxon* contended that the Maryland divestiture law affected interstate commerce by weakening the independent refiners, thereby changing the structure of the interstate market. The Court rejected this argument, refusing to "accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market." 437 U.S. at 127.

Thus it follows from the holding in *Exxon* that, absent some showing that a state enactment inhibits the flow of goods or services in interstate commerce, the Commerce Clause does not compel the state to justify its action even though the provision may affect certain businesses or business practices in interstate commerce or alter the "structure" of the interstate market. See *Detroit Automotive v. Lee,* 463 F. Supp. 954, 964 (D.Md. 1978); *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 806 (1976).[52]

The facts in the instant case come closer to *Exxon* than *Philadelphia. Philadelphia* represents state legislation that overtly freezes or blocks the flow of commerce for protectionist reasons and discriminates against products for no reason other than origin. On the other hand, *Exxon,* represents legislation that places no burden on the interstate flow of articles of commerce, but limits some, but not all, out-of-state firms by preventing them from controlling in-state facilities.[53]

Similarly, § 659.141(1) while discriminating to some extent as to some but not all out-of-state interstate firms, does not affect the flow of investment advisory services in interstate commerce. The fact that plaintiffs and other foreign based bank holding companies receive the brunt of the restriction does not necessarily mean that the statute burdens the flow of interstate commerce. The law does

[52] A similar argument is made as to § 660.10 see pp. 49-51 of Appellant's Brief.

[53] See gray Brief in Support of the Jurisdictional Statement for the Conference of State Bank Supervisors as Amicus Curiae, pp. 8-12.

not curtail the availability of interstate goods or services to consumers. There is certainly nothing in the record to suggest there are added costs on investment advisory services caused by this regulation. As far as the consumer is concerned, there is no distinction in the market place. As noted in *Exxon*, the Commerce Clause protects the market, *not* the marketer. To this extent, plaintiffs failed to sustain their burden, and thus the state need not justify its action, nor demonstrate non-discriminating alternatives.

Even if some burden on interstate commerce is found, defendant submits that § 659.141(1), as well as § 660.10, should be viewed as laws "directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia v. New Jersey*, 437 U.S. at 624.

Fundamentally, one must distinguish between the regulation of financial institutions and regulation of other more commonly known "articles" or services which may affect interstate commerce. Banking and trust business, which have traditionally been viewed together, involve matters of public trust and peculiar fiduciary responsibilities, and have a significant impact on local and national economic affairs. Consideration of financial institutions in light of large conglomerate bank holding company control only enhances the significance of this impact. The very nature of financial institutions themselves may necessarily require some burden on interstate commerce. To this extent, one must keep in mind these distinguishing characteristics when discussing banking and trust regulations which are subjected to Commerce Clause attacks.

The subject laws concern areas of substantial state interest. Section 660.10, as noted in Point II of Appellant's

Brief, concerns the regulation of fiduciary activities, an area of traditional state concern.[54] Investment advisory business is also an area of state concern, and subject to both federal and state control. Subchapter II of the Investment Companies and Advisors Act states, at 15 U.S.C. § 806-18a:

> Nothing in this subchapter shall affect the jurisdiction of the securities commissioner of any state over any security or any person insofar as it does not conflict with the provisions of this subchapter and regulations thereunder.[55]

A comparison of § 659.141 as it defines and restricts certain organizations from furnishing "investment advisory services" discloses no conflict with the federal regulation of investment advisors and is thus permissible. Therefore, it cannot be denied trust business and investment advisory business are areas of permissible state regulation and control. They are also directed to legitimate local concerns and do not unduly burden interstate commerce.

The principle effect of § 659.141(1) and § 660.10, to the extent that it compliments § 659.141(1), is to limit the expansion of foreign based bank holding companies into banking and "closely related" activities. This action is certainly consistent with the congressional intent and purpose behind the Bank Holding Company Act of 1956,

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[54] See note 12, *supra*, at p. 23.

[55] It should be noted that the defendant, the Commissioner of Banking of the State of Florida, is also the Securities Commissioner in Florida. See Chapter 517, Florida Statutes.

i.e. to limit the concentration of economic power in the hands of bank holding companies, and to separate banking and commerce by prohibiting entry into nonbanking activities. Indeed, Congress, through 12 U.S.C. §§ 1842(d) and 1846, granted to the states, the power to limit bank holding company expansion across state lines into not only banking, but into activities "closely related to banking."[56] And as noted above, these statutes place only a negligible burden on interstate commerce, if any at all, since they govern the control of outlets for articles of commerce and not the flow of articles themselves.

Even if both Florida laws impermissibly burden interstate commerce, Congress, pursuant to the Bank Holding Company Act, has authorized the states to pass these statutes. It has long been held that Congress, under its power over interstate commerce, may legitimately approve regulations by the states that would otherwise violate the Commerce Clause. See *e.g., Prudential Insurance Co. v. Benjamin,* 328 U.S. 408 (1946). In such event, usual commerce restrictions, such as those announced in *Philadelphia v. New Jersey, supra, Pike v. Bruce Church, supra,* do not apply because Congress is deemed to have consented to such legislation.

Defendant submits that Congress, through provisions of the Bank Holding Company Act, 12 U.S.C. §§ 1842(d) and 1846, has affirmatively consented to Florida's prohibition on the entry of foreign based bank holding companies and their subsidiaries into Florida. The district court

[56] See argument in Point I, for full discussion.

specifically, and we contend erroneously, rejected this contention, 461 F.Supp. at 1198-1201.

As to § 1846, Reservation of Rights to States, the court reasoned that the language "accomplishes nothing more than to assure that the states will not be deemed dispossessed of whatever regulatory authority they exercised over banks and bank holding companies prior to the passage of the Act." 461 F.Supp. 1199. The court arrives at this conclusion after analyzing the remarks of the Fifth Circuit in *Great Western United Corp. v. Kidwell,* 577 F.2d 1256 (5th Cir. 1978):[57]

> When Congress has exempted state laws from commerce clause restrictions it has used language specifically directing that certain interstate commerce may be regulated as though it were purely local. See, e.g., the Wilson Act of 1890, 26 Stat. 313. Congress had also stated that, in the absence of affirmative Congressional action, courts should impose no barriers on state regulation. See the McCarran-Ferguson Act, 59 Stat. 33, 15 U.S.C. § 1011 et seq. The language in § 28 of the 1934 Act is notably different from these acknowledged examples of Congressional consent. Rather than allowing violations of the commerce clause, § 28 appears to direct only that federal securities law should not be interpreted as a wholesale displacement of state securities regulation.

[57] The case was reversed and remanded on venue grounds in *Leroy v. Great Western Corporation,* ____U.S.____, 99 S.Ct. 2710 (1979).

Id. at 1281. Taking this language as dispositive of the issue, the district court below reasons, "Similarly, 12 U.S.C. § 1846 does not explicitly speak to exempting state banking and bank holding company regulation from the limitations of the Commerce Clause, and no such exemption should be read into the statute by this court."

However, the court has incorrectly and arbitrarily placed a rigid standard by which one merely looks to the specific language of a statute, without considering congressional intent and legislative purpose. To the contrary, the statutory language must be read in the context of congressional intent of an act, to determine if it operates to insure that the states are free to regulate a particular area without fear of attack under the Commerce Clause.

In *Great Western, supra,* the court viewed not only to the language of § 28 of the 1934 Securities Act, 15 U.S.C. § 78bb (1970),[58] but also to the legislative history in light of the particular state statute under attack: the Idaho takeover law. The Fifth Circuit noted; 557 F.2d at 1281,

> The legislative history of § 28 demonstrates that even if we were to interpret § 28 to remove some commerce clause restrictions, that consent would not be broad enough to settle the commerce

[58] Section 28 of the 1934 Act, 15 U.S.C. § 78bb (1970), provides in relevant part:

> Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder

> clause issue raised by the Idaho takeover law. The jurisdiction preserved in § 28 is that "of state security commissions to regulate transactions *within their own borders.*" H.R. Rep. No. 85, 73d Cong., 1st Sess. 10 (1933) . . . The Idaho takeover law, in contrast, controls transactions made throughout the world.

In contrast, the legislative history of 12 U.S.C. § 1846 demonstrates that Congress expressly preserved to the states a right to be more restrictive regarding the formation or operation of bank holding companies within their respective borders than the federal authorities can be or are under the Act.[59] The subject Florida laws clearly fall within these parameters.

In addition, the language and legislative history of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*,[60]

[59] See note 32, *supra,* at 38 and accompanying text.
text.

[60] The Act provides in relevant part:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several State . . .
>
> Sec. 2(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: . . .

show that § 1846 comes closer in comparison with this Act than recognized by the district court, in determining whether Congress gave the states a free hand to regulate bank holding companies within their borders without fear of attack under the Commerce Clause.

The McCarran-Ferguson Act was enacted in 1945 in response to this Court's decision in *United State v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944), holding that the business of insurance is interstate commerce. See *Group Life & Health Ins. v. Royal Drug Co.*, ___U.S.___, 99 S.Ct. 1067, 1076 (1979). There is no question that the primary purpose of the McCarran-Ferguson Act was to preserve state regulation of the activities of insurance companies, as it existed before the *South-Eastern Underwriters* case. The power of the states to regulate and tax insurance companies was threatened after that case, because of its holding that insurance companies are in interstate commerce. The McCarran-Ferguson Act operates to assure that the states are free to regulate insurance companies without fear of Commerce Clause attack. *Group Life*, 99 S.Ct. at 1076, not 18.

Similarly, the primary purpose of 12 U.S.C. § 1846 was to preserve state regulation of the activities of bank holding companies and their subsidiaries, and is broad enough to bar them from extendng their domains.[61] And it also operates to assure that the states are free to regulate bank holding companies and their subsidiaries without fear of Commerce Clause attack.

[61] See Point I-B and note 33, *supra*, at p. 39 and accompanying text.

The fact that § 1846 may not explicitly speak to exempting state bank holding company regulation from limitations of the Commerce Clause is of no consequence, because the legislative history of the 1956 Act does indeed require one to reach this conclusion. To this extent the district court erred in its analysis, by failing to take into account the proper congressional intent behind the 1956 Act and the scope of § 1846.

Likewise, in holding that 12 U.S.C. § 1842(d) did not demonstrate congressional consent to Florida's prohibition on the entry of foreign based bank holding companies, the district court misconstrues the intent of Congress.

In addressing 12 U.S.C. § 1842(d), the district court erroneously concluded that the Florida laws, "by drastically curtailing the rights of foreign bank holding companies and their subsidiares to engage in banking-related businesses in this state, are at least inconsistent with, if not contrary to, the desires of Congress." 461 F.Supp. at 1200. As shown in Point I-A of Appellant's Brief, the court misconstrues not only the scope of § 1842(d), but also the congressional intent and effect of the 1970 Amendments to the 1956 Act. Prior to the 1970 Amendments, § 1842(d) had been construed, in conjunction with § 1843(c)(8), as prohibiting bank holding company expansion across state lines, into "closely related" activities.[62] Furthermore, the 1970 Amendments to § 1843(c)(8), retaining the "closely re-

[62] See note 18, *supra*, at p. 28 and text of Point I-A at p. 27-28.

lated" language and adding the "public benefits" test, did not alter this prohibition.[63]

Therefore, as with § 1846, the district court erred in concluding that Congress, through § 1842(d), did not affirmatively consent to Florida's prohibition on the entry foreign based bank holding companies and their subsidiaries into Florida.

In enacting the Bank Holding Company Act of 1956, Congress has allowed the states a great deal of flexibility in their regulation of bank holding companies. More importantly, the Act operates to insure that the states are free to regulate bank holding companies and their subsidiaries without fear of attack under the Commerce Clause.

[63] See Point I-A at pp. 30-36.

CONCLUSION

The Judgment and Order of the district court, declaring Florida Statutes § 660.10 (1977) and a portion of Florida Statutes § 659.141(1) (1977) unconstitutional as violative of the Commerce Clause and enjoining defendant from enforcing that portion of § 659.141(1), should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A

Florida Statutes § 659.141 provides:

659.141 Control; ownership.—

(1) Except as provided in subsection (3), no bank, trust company, or holding company, the operations of which are principally conducted outside this state, shall acquire, retain, or own, directly, all or substantially all the assets of, or control over, any bank or trust company having a place of business in the state where the business of banking or trust business or functions are conducted, or acquire, retain, or own all, or substantially all, of the assets of, or control over, any business organization having a place of business in this state where or from which it furnishes investment advisory services in this state. However, if a bank, trust company, or holding company directly or indirectly owning all, or substantially all, the assets of, or having control over, a bank or a trust company or business organization to which the restrictions and prohibitions of this section apply, having acquired such assets or control prior to becoming disqualified hereunder, shall, on or after the effective date of this section, be or become disqualified hereunder to acquire, retain, or own the same, the restrictions and prohibitions of this section shall not be enforced against it for a period which, under all the circumstances, is determined by the department to be reasonable, not exceeding 2 years from the effective date of this act or from the date it becomes disqualified hereunder, whichever is later, unless said period of 2 years is extended by the department as herein provided. The department is authorized, upon a showing of undue hardship, to extend said period of 2 years from time to time if it determines that any such extension would not be detrimental to the public interest, but any such extension shall

not exceed 1 year and all thereof shall not in the aggregate exceed 3 years.

(2) Except as provided in subsection (3), for the purposes of this section:

(a) "Holding company" means any business organization which has control over any bank, trust company, or holding company, the operations of any of which are principally conducted inside or outside of the state.

(b) Any business organization has control over a bank, trust company, or holding company if:

1. The business organization, directly or indirectly or acting through one or more persons, owns, controls, or has power to vote 25 percent or more of the shares of any class of voting securities of the bank, trust company, or holding company;

2. The business organization controls in any manner the election of a majority of the directors or trustees of the bank, trust company, or holding company; or

3. The department determines that the business organization directly or indirectly exercises a controlling influence over the management or policies of the bank, trust company, or holding company.

(c) A business organization provides investment advisory services if, in this state, for compensation, it engages in the business of advising persons, as defined in § 1.01, either directly or indirectly, or through publications or writings, as to the value of securities or as to the advis-

ability of investment in or purchasing securities, or if, not being a certified public accountant, in this state and for compensation, it issues or distributes to persons, as defined in § 1.01, anaylses or reports concerning securities.

(d) The operations of a bank, trust company, or holding company are principally conducted outside this state if:

1. In the case of a bank, the largest amount of its total deposits are held outside this state;

2. In the case of a trust company, the largest amount of its total trust assets are held or administered outside this state; and

3. In the case of a holding company, the largest amount of the total deposits of all banks controlled by the holding company is held outside this state, or the largest amount of the total trust assets held by all trust companies controlled by the holding company is held or administered outside this state.

(e) "Business organization" means and includes any corporation, partnership, business trust, association, or similar organization, or any other trust unless by its terms it must terminate within 25 years or not later than 21 years and 10 months after the death of individuals living on the effective date of the trust, but shall not include any corporation the majority of the shares of which are owned by the United States or by this state.

(f) Shares of any kind or class of voting securities of a bank, trust company, or holding company shall be

deemed to be indirectly owned or controlled by a business organization if:

1. The shares are owned or controlled by any bank, trust company, or holding company over which the business organization has control; or

2. The shares are held or controlled directly or indirectly by trustees for the benefit of:

a. The business organization;

b. The shareholders or members of the business organization; or

c. The employees of the business organization, whether exclusively or not.

(g) Shares of any kind or class of the voting securities of any bank, trust company, or holding company which are transferred directly or indirectly to any transferee that is indebted to the transferor, or has one or more officers, directors, trustees, or beneficiaries in common with, or subject to control by, the transferor, shall be deemed to be indirectly owned or controlled by the transferor unless the department, after opportunity for hearing, determines that the transferor is not in fact capable of controlling the transferee.

(h) "Trust company" means any bank, corporation, or other business organization, whether organized or existing under the laws of this state or any other state or jurisdiction, which engages in, or is authorized to engage in, trust business.

(3) Notwithstanding any other provisions of this section, the restrictions and prohibitions of this section shall not apply:

(a) To the acquisition and retention of shares of the voting securities of a bank, trust company, or holding company by a bank or trust company acquiring or holding the same in a fiduciary capacity, except as provided in subparagraph (2)(f)2. and paragraph (2)(g). For the purpose of the preceding sentence, shares of a bank, trust company, or holding company shall not be deemed to have been acquired in a fiduciary capacity if the acquiring bank or trust company has sole discretionary authority to exercise voting rights with respect thereto; except that this limitation is applicable in the case of a bank or trust company acquiring such shares prior to the effective date of this act only if the bank or trust company has the right, consistent with its obligations under the instrument, agreement, or other arrangement establishing the fiduciary relationship, to divest itself of such voting rights and fails to exercise that right to divest within a reasonable period not to exceed 1 year after the effective date of this act.

(b) To the ownership or control of shares acquired by a bank, trust company or holding company in connection with its underwriting of securities, if such shares are held only for such period of time as will permit the sale thereof on a reasonable basis.

(c) To ownership, control, or retention of shares acquired in securing or collecting a debt contracted in good faith, until 2 years after the date of acquisition or the effective date of this act [March 28, 1972], whichever is later.

(d) To the ownership or control of shares acquired by a bank, trust company, or holding company prior to January 1, 1972.

(e) To any acquisition of a bank, trust company, or investment advisory business organization if an application for approval of such acqusition or notice of proposed investment advisory activities was filed with the Department of Banking and Finance or the Board of Governors of the Federal Reserve System or other appropriate federal regulatory agency having jurisdiction prior to June 1, 1972.

(f) To the establishment of one office in this state by a business organization which, on March 1, 1972, and for a period of 1 year prior thereto, rendered investment advisory services to trust companies or banks in this state from an office outside the state.

(g) To any bank, trust company, or holding company the operations of which are principally conducted outside this state, which, upon December 20, 1972, owned all the assets of, or control over, a bank or trust company located within and doing business within this state.

(h) To any bank authorized under 12 U.S.C.A. §§ 611-632, commonly referred to as "Edge Act Banks," when performing functions authorized under said act.

APPENDIX B

Florida Statutes § 660.10 provides:

All corporations except banks and trust companies incorporated under the laws of this state and having trust powers and except national banking associations located in this state and having trust powers, are prohibited from exercising any of the powers or duties and from acting in any of the capacities, within this state as follows:

(1) As executor or administrator of the estate of any decedent, whether such decedent was a resident of this state or not, and whether the administration of the estate of such decedent by original or ancillary; provided, that if the executor or administrator of the estate of a nonresident decendent be a corporation duly authorized, qualified and acting as such executor or administrator in the jurisdiction of the domicle of the decedent, it may, as a foreign executor or administrator perform such duties and exercise such powers and privileges as are required, authorized or permitted by § 734.30.

(2) As guardian of any infant, insane person or person physically or mentally incompetent whether domiciled in this state or not.

(3) As trustee under any will or other testamentary instrument, provided any corporation that is authorized to act as trustee under the laws of the place where it has its principal place of business may receive bequests as trustee of money or intangible personal property and devises of real property located in Florida and may sell, transfer and convey the property.

(4) As trustee of any real estate in this state or any

interest therein under any agreement whereby the beneficial interest in such property is vested in others.

(5) As trustee under any deed of trust or other instrument executed after June 10, 1937, conveying or encumbering any real or tangible personal property in this state given to secure bonds or other evidence of indebtedness unless in such deed of trust or other instrument a trust company or bank having trust powers and located in this state or an individual residing in this state shall be named as cotrustee; and no suit shall be brought to foreclose any such deed of trust or other instrument unless such cotrustee or successor cotrustees of like qualifications be a party plaintiff.

(6) As receiver or trustee under appointment of any court in this state.

(7) As assignee, receiver or trustee of any insolvent person or corporation or under any assignment for the benefit of creditors.

(8) As fiscal agent, transfer agent or registrar of any municipal or private corporation, provided that this prohibition shall not be so construed as to prevent banks and trust companies not located in this state from acting within the state or registrar of municipal or private corporations of this state; provided further, however, that nothing herein shall prevent any Florida corporation not a bank or trust company and not having trust powers from being its own fiscal agent, transfer agent or registrar concerning its own affairs, stock or securities. Provided, however, that nothing in this section or in any other law of this

state shall be construed to prohibit a foreign bank or foreign trust company as trustee of any charitable foundation or endowment, employees' pension, retirement or profit-sharing trust, alone or together with a cotrustee from: Contracting in this state or elsewhere with any person to acquire from such person a part or the entire interest in a loan which such person proposes to make, has heretofore made or hereafter makes, together with a like interest in any security instrument covering real or personal property in the state proposed to be given or hereafter or heretofore given to such person to secure or evidence such loan; servicing directly or entering into servicing contracts with persons, and enforcing in his state the obligations heretofore or hereafter acquired by it in the transaction of business outside of this state or in the transaction of any business authorized or permitted hereby; or acquiring, holding, leasing, mortgaging, contracting with respect to, or otherwise, protecting, managing, or conveying property in this state which has heretofore or may hereafter be assigned, transferred, mortgaged or conveyed to it as security for, or in whole or in part in satisfaction of, a loan or loans made by it or obligations acquired by it in the transaction of any business authorized or permitted hereby; provided, further, that no such foreign bank or trust company shall be deemed to be transacting business in this state, or be required to qualify so to do, or to be unlawfully exercising powers or duties or acting in an unlawful or prohibited capacity or to be violating any of the provisions of this section or of any other law of this state, solely by reason of the performance of any of the acts of business hereinbefore permitted or authorized hereby; and provided, further, that nothing herein shall be construed as authorizing or permitting any foreign bank or trust company to maintain an office within this state.

APPENDIX C

12 U.S.C. § 1842(d) provides:

(d) Limitation by State boundaries. Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all of substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on the effective date of this amendment [enacted July 1, 1966] or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

APPENDIX D

The relevant portion of 12 U.S.C. § 1843 provides:

§ 1843. Interests in nonbanking organizations

(a) Ownership or control of voting shares of any company not a bank; engagement in activities other than banking. Except as otherwise provided in this Act no bank holding company shall—

(1) after the date of enactment of this Act [enacted May 9, 1956], acquire direct or indirect ownership or control of any voting shares of any company which is not a bank, or

(2) after two years from the date as of which it becomes a bank holding company, or in the case of a company which has been continously affiliated since May 15, 1955, with a company which was registered under the Investment Company Act of 1940, prior to May 15, 1955, in such a manner as to constitute an affiliated company within the meaning of that Act, after December 31, 1978, or, in the case of any company which becomes, as a result of the enactment of the Bank Holding Company Act Amendments of 1970, a bank holding company on the date of such enactment [enacted Dec. 21, 1970], after December 31, 1980, retain direct or indirect ownership or control of any voting shares of any company which is not a bank or bank holding company or engage in any activities other than (A) those of banking or of managing or controlling banks and other subsidiaries authorized under this Act or of furnishing services to or performing services for its subsidiaries, and (B) those permitted under paragraph (8) of subsection (c) of this section subject to all the conditions specified in

such paragraph or in any order or regulation issued by the Board under such paragraph: . . .

(c) Exemptions. The prohibitions in this section shall not apply to (i) any company that was on January 4, 1977, both a bank holding company and a labor, agricultural, or horticultural organization exempt from taxation under section 501 of the Internal Revenue Code of 1954 [26 USCS § 501], or to any labor, agricultural, or horticultural organization to which all or substantially all of the assets of such company are hereafter transferred, or (ii) a company covered in 1970 more than 85 per centum of the voting stock of which was collectively owned on June 30, 1968, and continously thereafter, directly or indirectly, by or for members of the same family, or their spouses, who are lineal descendants of common ancestors; and such prohibitions shall not, with respect to any other bank holding company, apply to—

(8) shares of any company the activities of which the Board after due notice and opportunity for hearing has determined (by order or regulation) to be so closely related to banking or managing or controlling banks as to be a proper incident thereto. In determining whether a particular activity is a proper incident to banking or managing or controlling banks the Board shall consider whether its performance by an affliate of a holding company can reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair competition, conflicts of interests, or unsound banking practices. In orders and regulations under this subsection,

the Board may differentiate between activities commenced de novo and activities commenced by the acquisition, in whole or in part, of a going concern; . . .

APPENDIX E

12 U.S.C. § 1846 provides:

§ 1846. Reservation of rights to States. The enactment by the Congress of the Bank Holding Company Act of 1956 shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

12 C.F.R. § 225.4(a)(4) and (5) provides in relevant part:

(a) . . . The following activities have been determined by the Board to be so closely related to banking or managing or controlling banks as to be a proper incident thereto: . . .

(4) Performing or carrying on any one or more of the functions or activities that may be performed or carried on by a trust company (including activities of a fiduciary, agency, or custodian nature), In the manner authorized by Federal or State law, so long as the institution does not make loans or investments or accept deposits other than (i) deposits that are generated from trust funds not currently invested and are properly secured to the extent required by law, or (ii) deposits representing funds received for a special use in the capacity of managing agent or custodian for an owner of, or investor in, real property, securities, or other personal property, or for such owner or investor as agent or custodian of funds held for investment or escrow agent, or for an issuer of, or broker or dealer in securities, in a capacity such as paying agent, dividend disbursing agent, or securities clearing agent, and not employed by or for the account of the customer in the manner of a general purpose checking account or bearing interest, or (iii) making of call loans to securities dealers or purchase of money market instruments such as certificates of deposit, commercial paper, government or municipal securities, and bankers acceptances (such authorized loans and investments, however, may not be used as a method of channeling funds to nonbanking affiliates of the trust company);

(5) Acting as investment or financial adviser to the extent of (i) serving as the advisory company for a mortgage or a real estate investment trust; (ii) serving as investment adviser, as defined in section 2(a)(20) of the Investment Company Act of 1940, to an investment company registered under that Act; (iii) providing portfolio investment advise to any other person; (iv) furnishing general economic information and advice, general economic statistical forecasting services and industry studies, and (v) providing financial advice to State and local governments, such as with respect to the issuance of their securities.

PROOF OF SERVICE

I, Franklyn John Wollett, one of the attorneys for GERALD A. LEWIS, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 14th day of November, 1979, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Appellant's Brief on the Merits on the several parties thereto, as follows:

1. On BT INVESTMENT MANAGERS, INC., and BANKERS TRUST NEW YORK CORPORATION, Appellees, by depositing us such copies in the United States Post Office, Tallahassee, Florida, with first class postage prepaid, properly addressed to Appellees counsel of record, John E. Mathews, Jr., Esq. and Stephen E. Day, Esq. of Mathews, Osborne, Ehrlich, McNatt, Gobelman and Cobb, at 1500 American Heritage Life Building, Jacksonville, Florida, 32202;

2. On Florida Bankers Association, Amicus Curiae, by depositing such copies in the United States Post Office, Tallahassee, Florida, with first class postage prepaid, properly addressed to its counsel of record, J. Thomas Cardwell, Esq., of Akerman, Senterfitt and Eidson, 17th Floor, CNA Building, Post Office Box 231, Orlando, Florida, 32802;

3. On The New York Clearing House Association, Amicus Curiae, by depositing such copies in the United States Post Office, Tallahassee, Florida, with first class postage prepaid, properly addressed to its counsel of record, John L. Warden, Esq., H. Rodgin Cohen, Esq., and Robert D. Owen, Esq., of Sullivan & Cromwell, 125 Broad Street, New York, New York, 10004;

4. On Conference of State Bank Supervisors, Amicus Curiae, by depositing such copies in the United States Post Office, Tallahassee, Florida, with first class postage prepaid, properly addressed to its counsel of record, Erwin N. Griswold and James F. Bell, of Jones, Day, Reavis and Pogue, 1100 Connecticut Avenue, N.W., Washington, D.C., 20036.

All parties required to be served have been served.

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